DOCKET

No. 13-1333

Title:	Andre Lee Coleman, aka Andre Lee Coleman-Bey, Petitioner
	v.
	Todd Tollefson, et al.
Docketed:	May 5, 2014
Linked with 13A985	
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Nos.:	(11-1502)
Decision Date:	October 23, 2013
Rehearing Denied:	January 17, 2014
	Rule 12.4

Questions Presented

---Date---	------Proceedings and Orders----------
Mar 27 2014	Application (13A985) to extend the time to file a petition for a writ of certiorari from April 17, 2014 to May 12, 2014, submitted to Justice Kagan.
Mar 27 2014	Application (13A985) granted by Justice Kagan extending the time to file until May 12, 2014.
May 5 2014	Petition for a writ of certiorari filed. (Response due June 4, 2014)
May 28 2014	Waiver of right of respondents Todd Tollefson, et al. to respond filed.
Jun 4 2014	Brief amicus curiae of Constitutional Accountability Center filed.
Jun 18 2014	DISTRIBUTED for Conference of September 29, 2014.
Jun 23 2014	Response Requested. (Due July 23, 2014)
Jul 2 2014	Order extending time to file response to petition to and including August 22, 2014.
Aug 21 2014	Brief of respondents Todd Tollefson, et al. in opposition filed.
Sep 9 2014	Reply of petitioner Andre Lee Coleman-Bey filed.
Sep 10 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 2 2014	Petition GRANTED.
Oct 27 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Oct 31 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 1, 2014.
Oct 31 2014	The time to file respondents' brief on the merits is extended to and including January 14, 2015.
Dec 1 2014	Joint appendix filed. (Statement of costs filed.)
Dec 1 2014	Brief of petitioner Andre Lee Coleman-Bey filed.
Dec 8 2014	Brief amicus curiae of Constitutional Accountability Center filed.
Dec 8 2014	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 8 2014	Brief amici curiae of Thirty-three Professors filed.

Dec 22 2014	SET FOR ARGUMENT ON Monday, February 23, 2015
Dec 22 2014	Record requested from U.S.C.A. 6th Circuit.
Dec 23 2014	Record received from U.S.C.A. 6th Circuit, the record is electronic.
Jan 7 2015	CIRCULATED.
Jan 14 2015	Brief of respondents Todd Tollefson, et al. filed. (Distributed)
Jan 21 2015	Brief amicus curiae of the United States filed. (Distributed)
Jan 21 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 10 2015	Reply of petitioner Andre Lee Coleman-Bey filed. (Distributed)
Feb 20 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 23 2015	Argued. For petitioner: Kannon K. Shanmugan, Washington, D. C. For respondents: Aaron D. Lindstrom, Solicitor General, Lansing, Mich., and Allon Kedem, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
May 18 2015	Adjudged to be AFFIRMED. Breyer, J., delivered the opinion for a unanimous Court.
Jun 19 2015	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

13-1333

No.

In the Supreme Court of the United States

ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

TODD TOLLEFSON, ET AL.

ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

BERTINA BOWERMAN, ET AL.

ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

STEVEN DYKEHOUSE, ET AL.

ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

AARON J. VROMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the "three strikes" provision of the Prison Litigation Reform Act, 28 U.S.C. 1915(g), a district court's dismissal of a lawsuit counts as a "strike" while it is still pending on appeal or before the time for seeking appellate review has passed.

PARTIES TO THE PROCEEDING

Pursuant to Rule 12.4, this petition for a writ of certiorari covers the judgments in four cases. Petitioner in each of the four cases is André Lee Coleman-Bey.

Respondents in *Coleman-Bey* v. *Tollefson* are Todd Tollefson, Mary Aho, James G. Armstrong, Joseph Bouchard, William Luetzow, and Kimberly Mieni.

Respondents in *Coleman-Bey* v. *Bowerman* are Bertina Bowerman, Mary Boneville, and Kimberly Hill.

Respondents in *Coleman-Bey* v. *Dykehouse* are Steven Dykehouse, Ronald T. Embry, Sam Norman, and Debra Olger.

Respondents in *Coleman-Bey* v. *Vroman* are Aaron J. Vroman and Mary E. Fate.

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In the Supreme Court of the United States

No.

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v.

AARON J. VROMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

André Lee Coleman-Bey respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in these cases. Pursuant to Rule 12.4, petitioner files a single petition covering all of the judgments in these cases, as they arise from the same court and involve identical or closely related questions.

OPINIONS BELOW

The opinion of the court of appeals in *Coleman-Bey* v. *Tollefson* (App., *infra*, 1a-14a) is reported at 733 F.3d 175. The relevant orders of the court of appeals in *Coleman-Bey* v. *Bowerman* (App., *infra*, 26a-29a), *Coleman-Bey* v. *Dykehouse* (App., *infra*, 36a-39a), and *Coleman-Bey* v. *Vroman* (App., *infra*, 46a-49a) are unreported. The opinions of the district courts in all four cases (App., *infra*, 17a-25a, 32a-35a, 42a-45a, 52a-54a) are unreported.

JURISDICTION

The judgment of the court of appeals in *Tollefson* was entered on October 23, 2013. A petition for rehearing was denied on January 17, 2014 (App., *infra*, 15a-16a). The relevant orders of the court of appeals in *Bowerman*, *Dykehouse*, and *Vroman* were entered on January 10, 2014. On March 27, 2014, Justice Kagan extended the time within which to file a petition for a writ of certiorari in these cases to and including May 12, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1915(g) of Title 28 of the United States Code provides as follows:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

STATEMENT

These cases present a deep conflict among the courts of appeals on a straightforward and important question of statutory interpretation. The "three strikes" provision of the Prison Litigation Reform Act, 28 U.S.C. 1915(g), generally prohibits a prisoner from proceeding *in forma pauperis* in federal court if "the prisoner has, on 3 or more prior occasions, while incarcerated * * *, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." These cases present the question whether a district court's dismissal of a lawsuit on one of the stated grounds counts as a "strike" for purposes of Section 1915(g) while it is still pending on appeal or before the time for seeking appellate review has passed.

In each of these cases, petitioner, a Michigan state prisoner, filed a civil-rights action in federal court and moved for leave to proceed *in forma pauperis* while a dismissal that would have counted as his third "strike" was still on appeal. In each case, the district court denied petitioner's motion. App., *infra*, 17a-25a, 32a-35a, 42a-45a, 52a-54a.

In the first of these cases, *Tollefson*, the Sixth Circuit affirmed. App., *infra*, 1a-14a. In a divided opinion, it held that a dismissal counts as a "strike" even if it was still on appeal at the time the instant action was commenced. Notably, both the majority and the dissenting opinions acknowledged that the court's decision deepened a circuit conflict on the question whether exhaustion or forfeiture of appeal is necessary before a dismissal can count as a "strike" for purposes of Section 1915(g). And both the majority and the dissenting opinions recognized that the court's interpretation was contrary to that of most of the other courts of appeals. Ap-

plying its decision in *Tollefson*, the court of appeals subsequently denied petitioner *in forma pauperis* status in the other cases. Because these cases constitute an ideal vehicle for resolving the circuit conflict on an important and recurring question of federal law, the petition for a writ of certiorari should be granted.

1. Enacted in 1892, the federal *in forma pauperis* statute "is designed to ensure that indigent litigants have meaningful access to the federal courts." *Neitzke* v. *Williams*, 490 U.S. 319, 324 (1989) (citation omitted). Congress most recently amended that statute in 1996 as part of the Prison Litigation Reform Act (PLRA). See Pub. L. No. 104-134, § 804, 110 Stat. 1321-73 to 1321-75. In the PLRA, Congress sought to "address[] th[e] challenge" of "ensuring that the flood of nonmeritorious claims [by prisoners] does not submerge and effectively preclude consideration of the allegations with merit." *Jones* v. *Bock*, 549 U.S. 199, 203 (2007). Consistent with our legal system's "guarantee[] that prisoner claims of illegal conduct by their custodians are fairly handled according to law," Congress enacted a variety of reforms designed to "filter out" nonmeritorious prisoner claims while "facilitat[ing] consideration" of meritorious ones. *Id.* at 203-204.

Of relevance here, the PLRA added Section 1915(g) to the federal *in forma pauperis* statute. That subsection, known as the "three strikes" provision, prohibits a prisoner from proceeding *in forma pauperis* in federal court if "the prisoner has, on 3 or more prior occasions, while incarcerated * * *, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted," unless the prisoner is in imminent physical danger. 28 U.S.C. 1915(g). In most instances, therefore, a prisoner who is

deemed to have three or more "strikes" under Section 1915(g) is barred from proceeding with a civil action in federal court unless he first pays the full amount of the ordinary filing fee (currently set at $350). See 28 U.S.C. 1914(a).

2. Petitioner is an inmate in the Baraga Correctional Facility, a Michigan state prison. On December 3, 2010, petitioner filed a civil-rights action in the United States District Court for the Western District of Michigan under 42 U.S.C. 1983 against Todd Tollefson and five other Baraga employees, asserting that they had violated his constitutional rights by interfering with his access to the courts. He also moved for leave to proceed *in forma pauperis*. App., *infra*, 2a, 17a.

Citing the "three strikes" provision, the district court denied petitioner's motion. App., *infra*, 17a-20a. The district court identified three prior lawsuits that had been filed by petitioner and dismissed by federal district courts in 1992, 2008, and 2009. *Id.* at 19a. The court added that petitioner did not qualify for the exception to the "three strikes" rule because he was not in imminent physical danger. *Id.* at 19a-20a.

Petitioner moved for reconsideration, arguing, as is relevant here, that the third of the dismissals on which the district court relied could not count as a "strike" because it was still on appeal when petitioner filed the instant complaint (and when the district court denied him leave to proceed *in forma pauperis*). The district court denied the motion. App., *infra*, 21a-25a. The court concluded that "a dismissal counts as a strike even if it is pending on appeal at the time that the plaintiff files his new action." *Id.* at 24a. The district court acknowledged that the Fifth Circuit had reached the opposite conclusion, but declined to follow its reasoning. *Id.* at 23a-24a (citing *Adepegba* v. *Hammons*, 103 F.3d 383 (1996)). The

district court asserted that "[t]he language of [Section] 1915(g) is clear, and it does not make an exception for a dismissal that has been appealed." *Id.* at 23a. In the court's view, "a judgment of dismissal by a district court is final and should be given full effect, unless stayed upon appeal." *Ibid.*

Because of the denial of *in forma pauperis* status, petitioner was unable to pursue his claims, and the district court dismissed the complaint for want of prosecution. The court, however, did grant petitioner leave to proceed *in forma pauperis* for purposes of appeal. App., *infra*, 2a.

3. A divided court of appeals affirmed, holding that a district court's dismissal of a lawsuit counts as a "strike" for purposes of Section 1915(g) even if it was still on appeal at the time the instant action was commenced. App., *infra*, 1a-14a.

a. The court of appeals reasoned that "[a] literal reading of [Section] 1915(g) requires district courts to count as strikes cases that are dismissed on the grounds enumerated in the provision even when pending on appeal." App., *infra*, 4a. The court explained that, because Section 1915(g) "does not say that the dismissal must be final in all of the courts of the United States," a "case pending on appeal" still counts as a "strike." *Ibid.* (citation omitted). The court added that its approach was "consistent with how judgments are treated for purposes of res judicata," because "cases on appeal have preclusive effect until they are reversed or vacated." *Id.* at 5a. In so construing Section 1915(g), the court of appeals noted that the Seventh Circuit had reached the same conclusion in *Robinson* v. *Powell*, 297 F.3d 540 (2002). App., *infra*, 4a.

The court of appeals acknowledged that "several circuits have held that dismissal does not count as a strike

until the litigant has exhausted or waived his appellate rights." App., *infra*, 5a (citing *Henslee* v. *Keller*, 681 F.3d 538 (4th Cir. 2012); *Silva* v. *Di Vittorio*, 658 F.3d 1090 (9th Cir. 2011); *Smith* v. *Veterans Administration*, 636 F.3d 1306 (10th Cir. 2011); *Chavis* v. *Chappius*, 618 F.3d 162 (2d Cir. 2010); *Nicholas* v. *American Detective Agency*, 254 Fed. Appx. 116 (3d Cir. 2007) (per curiam); *Thompson* v. *DEA*, 492 F.3d 428 (D.C. Cir. 2007); *Campbell* v. *Davenport Police Department*, 471 F.3d 952 (8th Cir. 2006) (per curiam); and *Adepegba*, *supra*). The court of appeals, however, rejected the analysis of those courts. *Id.* at 5a-6a. Instead, the court of appeals held that a district court's dismissal of a lawsuit "count[s] as a strike continually from when it was entered." *Id.* at 7a. Because of that holding, the court of appeals did not "address the relevance" of the timing of the eventual affirmance of the dismissal at issue. *Ibid.*[1]

b. Judge Daughtrey dissented. App., *infra*, 7a-14a. She described as "both more compelling and more fair" "the reasoning that has led the great majority of circuits to conclude that dismissals count as strikes under the PLRA only when those dismissals have become final—*i.e.*, when the plaintiff has exhausted or waived his appellate rights." *Id.* at 9a. She rejected the panel majority's contention that "the majority rule distorts the plain meaning of the PLRA." *Ibid.* As she noted, "[S]ection

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[1] The court of appeals affirmed the dismissal at issue on March 29, 2011—not only after petitioner filed the instant action, but also (contrary to the court of appeals' opinion in *Tollefson*, see App., *infra*, 7a) after the district court denied petitioner's motion for leave to proceed *in forma pauperis* on February 15, 2011. Petitioner did not petition this Court for review of the court of appeals' decision affirming the dismissal at issue, and his time to do so expired on June 27, 2011.

1915(g) does not expressly state whether a prior dismissal of 'an action or appeal' must be final before it can be considered a 'strike.'" *Ibid.* (citation omitted).

Construing Section 1915(g) "in light of its history and purpose," Judge Daughtrey reasoned that "Congress could not have intended that dismissals would count as strikes immediately, given Congress's concern with fostering meritorious prisoner suits and preventing frivolous ones." App., *infra*, 10a. She explained that the panel majority's interpretation "could potentially bar the filing of meritorious claims * * * by preventing prisoners from bringing claims in federal court while one or more of their first three dismissals were being reversed on appeal." *Id.* at 10a-11a. And she criticized the panel majority for "fail[ing] to provide any relief for litigants like [petitioner] who seek pauper status to litigate [a] * * * case" unrelated to the underlying dismissals. *Id.* at 12a.

Because Judge Daughtrey would have held that "dismissals of causes of action do not count as strikes under the PLRA until the prisoner-plaintiffs have exhausted or waived their appeals," she would have reached the question that the panel majority did not: namely, "at precisely what point in the litigation process the finality of any prior dismissals should be assessed." App., *infra*, 12a. In light of the relevant statutory language, as well as various decisions of other courts, Judge Daughtrey would have assessed finality as of the date of the filing of the complaint (or, in the case of a prisoner seeking *in forma pauperis* status on appeal, the date of the notice of appeal). *Id.* at 13a. Because the dismissal at issue was still on appeal when petitioner filed the instant complaint, Judge Daughtrey concluded that the district court should have granted petitioner *in forma pauperis* status. *Id.* at 13a-14a.

The court of appeals subsequently denied rehearing en banc. App., *infra*, 15a-16a. Judge Daughtrey would have granted panel rehearing. *Id.* at 16a.

4. Like *Tollefson*, the other cases that are the subject of this petition—*Bowerman*, *Dykehouse*, and *Vroman*—were civil-rights actions filed by petitioner in the Western District of Michigan under Section 1983. In each case, as in *Tollefson*, the dismissal that would have counted as the third "strike" was still on appeal when the instant complaint was filed. App., *infra*, 34a, 44a, 53a.[2] And the district court denied petitioner's motion for leave to proceed *in forma pauperis* on materially identical reasoning to that in *Tollefson*. *Id.* at 33a-35a, 43a-45a, 52a-53a.

In each case, as in *Tollefson*, petitioner was unable to pursue his claims because of the district court's denial of *in forma pauperis* status, and the district court dismissed the complaints for want of prosecution. Unlike in *Tollefson*, however, the district court also denied petitioner leave to proceed *in forma pauperis* for purposes of appeal. App., *infra*, 27a, 37a, 47a.

As a result, in each case, petitioner had to apply to the court of appeals for leave to proceed *in forma pauperis* on appeal before he could appeal the district court's underlying denial of *in forma pauperis* status. Relying on its earlier decision in *Tollefson*, the court of appeals issued materially identical orders in each case denying petitioner's motion for leave to proceed *in forma pauperis* on appeal. App., *infra*, 26a-29a, 36a-39a,

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[2] In addition, in each case except for *Bowerman*, the dismissal was still on appeal (or the time for filing a petition for certiorari had not expired) when the district court denied petitioner's motion for leave to proceed *in forma pauperis*. App., *infra*, 32a, 42a, 52a.

46a-51a. The court cited *Tollefson* for the proposition that "a dismissal of a case for failure to state a claim qualifies as a 'strike' even if the appeal from the dismissal is pending at the time a prisoner files a new complaint." *Id.* at 28a, 38a, 48a (citing *id.* at 4a). The court of appeals subsequently dismissed each appeal for want of prosecution. *Id.* at 30a-31a, 40a-41a, 50a-51a.

REASONS FOR GRANTING THE PETITION

These cases present a straightforward and mature conflict among the courts of appeals on an important and recurring question of statutory interpretation. In the decision below, the Sixth Circuit expressly recognized that it was deepening an existing conflict on the question whether a district court's dismissal of a lawsuit counts as a "strike" for purposes of the PLRA's "three strikes" provision before petitioner has exhausted or forfeited appellate review. In fact, all twelve of the regional circuits have now spoken to the issue in some fashion. Seven circuits have squarely held that a dismissal does not count as a "strike" while it is still pending on appeal or before the time for seeking appellate review has passed, and three others have suggested that they agree with that interpretation. By contrast, besides the Sixth Circuit, only one other circuit has held that such a dismissal does count as a "strike."

That conflict warrants the Court's review in these cases. The question presented is of substantial legal and practical importance. And these cases constitute an optimal vehicle for consideration and resolution of that question—both because they cleanly present that question and because the question, while frequently encountered and extensively addressed by the lower courts, only rarely reaches the Court (and does so here with the assistance of counsel). Because these cases readily satis-

fy the criteria for further review, the petition for certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Courts Of Appeals

As both the majority and the dissenting opinions in *Tollefson* recognized, see App., *infra*, 4a-5a; *id.* at 8a-9a (Daughtrey, J., dissenting), the Sixth Circuit's decision deepens a conflict among the courts of appeals concerning whether a dismissal that is still pending on appeal counts as a "strike" under Section 1915(g) for purposes of foreclosing a prisoner's ability to proceed *in forma pauperis*. That conflict has been acknowledged not only by the Sixth Circuit, but by many others. See, *e.g.*, *Henslee* v. *Keller*, 681 F.3d 538, 541 (4th Cir. 2012); *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1099 (9th Cir. 2011); *Thompson* v. *DEA*, 492 F.3d 428, 432-433 (D.C. Cir. 2007); *Robinson* v. *Powell*, 297 F.3d 540, 541 (7th Cir. 2002). This Court's review is necessary to resolve that conflict.

1. As the Sixth Circuit noted in *Tollefson*, "several circuits have held that dismissal does not count as a strike until the litigant has exhausted or waived his appellate rights." App., *infra*, 5a; see *id.* at 8a-9a (Daughtrey, J., dissenting). Seven courts of appeals have squarely held that a dismissal does not count as a "strike" while it is still pending on appeal or before the time for seeking appellate review has passed, and three other courts of appeals have signaled agreement with that interpretation.

a. One of the earliest decisions interpreting Section 1915(g) was *Adepegba* v. *Hammons*, 103 F.3d 383 (5th Cir. 1996). As is relevant here, the Fifth Circuit held that "[a] dismissal should not count against a petitioner until he has exhausted or waived his appeals" because

"[a]ny other reading of the statute poses a risk of inadvertently punishing nonculpable conduct." *Id.* at 387. The court reasoned that "[i]t is uncontroversial from the plain language of the statute that Congress intended [S]ection 1915(g) only to penalize litigation that is truly frivolous, not to freeze out meritorious claims or ossify district court errors." *Id.* at 388. A "hyper-literal reading" of the statute, by contrast, could cause a prisoner's fourth action to "expire while his first three dismissals were being reversed on appeal," and could even bar "a prisoner's appeal of an erroneous third strike" on the theory that the appeal "follow[ed] three prior dismissals." *Id.* at 387-388. Applying its interpretation, the Fifth Circuit refused to count the district court's dismissal of the plaintiff's underlying complaint as a "strike," though it ultimately denied the plaintiff *in forma pauperis* status because he had three prior dismissals that had become final on appeal. *Id.* at 388.

More recently, a divided panel of the Ninth Circuit agreed with the Fifth Circuit's decision in *Adepegba* and expanded on its reasoning. In *Silva*, *supra*, the Ninth Circuit held that a dismissal does not count as a "strike" "until it becomes final, that is, after the prisoner has waived or exhausted his opportunity to appeal." 658 F.3d at 1098. The court reasoned that, although Section 1915(g) does not expressly state whether a dismissal must be "final" in this sense, "reading the statute otherwise would be a departure from the usual practice" under 28 U.S.C. 1291 and the Federal Rules of Appellate Procedure. *Ibid.* "Congress's silence on this issue," the Ninth Circuit continued, "is 'strong evidence that the usual practice should be followed,'" and "[w]e must heed the Supreme Court's warning not to 'depart from the usual practice * * * on the basis of perceived policy concerns.'" *Id.* at 1098, 1100 (quoting *Jones*, 549 U.S. at

212). The Ninth Circuit therefore concluded that none of the three dismissals at issue should be counted as "strikes" against the plaintiff, because none was final when the plaintiff filed his notice of appeal in the instant case. *Id.* at 1100-1101.[3]

A panel of the Tenth Circuit reached the same conclusion, with approval from the en banc court, in *Jennings* v. *Natrona County Detention Center Medical Facility*, 175 F.3d 775 (1999). Adopting the Fifth Circuit's reasoning in *Adepegba*, the Tenth Circuit held that a district court's dismissal "does not count as a strike until after the litigant has exhausted or waived his opportunity to appeal." *Id.* at 779-780. Because some language in earlier Tenth Circuit decisions was arguably inconsistent with that holding, the panel circulated the opinion to the en banc court, and "[e]ach member of the en banc court * * * concurred with [the] holding." *Id.* at 780 n.3. Applying its interpretation, the Tenth Circuit granted the plaintiff leave to proceed *in forma pauperis* on appeal and ruled that the district court, in denying leave, had erroneously counted as "strikes" both an earlier dismissal that was still pending on appeal and the dismissal of the plaintiff's underlying complaint. *Id.* at 779, 781.

The Eighth Circuit followed suit in *Campbell* v. *Davenport Police Department*, 471 F.3d 952 (2006) (per curiam). Citing *Adepegba* and *Jennings*, the court held

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[3] Judge O'Scannlain dissented. See 658 F.3d at 1106-1108. He would have held that a court should "look no further than the fact of *dismissal* when tallying strikes," regardless of "the case's subsequent appellate process." *Id.* at 1107. He also contended that the majority's approach would place a "strain * * * upon the federal courts" by permitting more complaints by prisoners to go forward. *Id.* at 1108.

that dismissals do not count as a "strikes" where the plaintiff "had not yet exhausted or waived his appeals in those cases" at the time he filed the instant complaint. *Id.* at 952, 953. Because none of the three dismissals at issue met that standard, the Eighth Circuit reversed the district court's denial of *in forma pauperis* status. *Id.* at 953.

Similarly, in *Thompson*, *supra*, the District of Columbia Circuit held that "a dismissal does not become a strike until an appeal thereof has been resolved or waived." 492 F.3d at 439. "Although [S]ection 1915(g) nowhere expressly states that dismissals must be final to count as strikes," the court explained, "we think it fairly implied." *Id.* at 432. Citing *Adepegba*, *Jennings*, and *Campbell*, the court reasoned that "[a] contrary rule would * * * effectively eliminate our appellate function" in cases in which a third "strike" is appealed. *Ibid.* "Had Congress intended such an unusual result," the court concluded, "we expect it would have clearly said so." *Ibid.*

Most recently, in *Ball* v. *Famiglio*, 726 F.3d 448 (2013), cert. denied, 134 S. Ct. 1547 (2014), the Third Circuit adopted "the rule of those circuits that hold that a dismissal does not count as a strike until it has been affirmed on appeal, or the opportunity to appeal has otherwise concluded." *Id.* at 465. In assessing whether the plaintiff was entitled to proceed *in forma pauperis* on appeal, the court determined that three of his prior dismissals did not count as "strikes" because they were not final when he filed the instant notice of appeal. *Id.* at 465-466.

Finally with regard to this side of the conflict, the First Circuit has applied the majority rule in an unpublished opinion. In *Michaud* v. *City of Rochester*, No. 00-1263, 2000 WL 1886289 (Dec. 27, 2000), the court de-

nied the defendants' request to revoke the plaintiff's *in forma pauperis* status, reasoning that, "[f]or reasons fully explained in the case law," the plaintiff "ha[d] not accumulated the requisite 'three strikes' under the statute." *Id.* at *2 n.1. The court cited *Adepegba* and *Jennings* for the principle that "dismissals by the district court should not be counted until after a petitioner has exhausted or waived his avenues of appeal." *Ibid.*

b. In addition to those square holdings from the First, Third, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits, the Second, Fourth, and Eleventh Circuits have suggested, to varying degrees, that they would follow the majority's interpretation of Section 1915(g).

In *Henslee*, *supra*, the Fourth Circuit addressed only the question whether a dismissal can "act as a strike to preclude [*in forma pauperis*] status on its own appeal." 681 F.3d at 543. The court reasoned that "a 'prior occasion[]' under [Section] 1915(g) cannot include the dismissal of the underlying claim." *Ibid.* While the court ultimately reserved the question presented here—*viz.*, whether a dismissal must be final on appeal to count as a "strike"—it agreed with decisions applying the majority rule that "Congress would have explicitly indicated any intent to limit the general rule allowing appeal as of right." *Id.* at 543 & n.11. On that basis, the court concluded that "[i]t would * * * be improper to interpret 'occasions,' *and* [*Section*] *1915(g) generally*, to limit the Court's appellate function in a defined class of cases." *Id.* at 543 (emphasis added). The Fourth Circuit's reasoning thus strongly suggests it would hold that a dismissal does not count as a "strike" while it is still pending on appeal.

Much the same can be said of the Second Circuit's decision in *Chavis* v. *Chappius*, 618 F.3d 162 (2010). Like the Fourth Circuit in *Henslee*, the Second Circuit

ultimately reserved the question presented here. *Id.* at 169. But the court acknowledged the plaintiff's argument that denying appellate review of a dismissal that would otherwise count as a third "strike" could lead to an "unintended and untoward result," while noting that the majority rule avoided that result by "giv[ing] that dismissal no weight as of yet." *Id.* at 168-169 (citing *Adepegba*, *Jennings*, *Campbell*, and *Thompson*). Because the plaintiff in that case had three strikes from prior lawsuits, the court did not need to resolve the question whether a dismissal counts as a "strike" while it is still pending on appeal. *Id.* at 169.

As for the Eleventh Circuit, it has articulated the requirements of the "three strikes" provision in a way that suggests it would follow the majority view. In its unpublished opinion in *Casey* v. *Scott*, 493 Fed. Appx. 1000 (2012) (per curiam), the Eleventh Circuit affirmed a district court's denial of *in forma pauperis* status. In so doing, the Eleventh Circuit noted not only that the district court had dismissed three prior lawsuits for failure to state a claim, but also that the plaintiff "did not appeal these dismissals, which was the proper avenue for challenging their merit." *Id.* at 1001. Because whether or not the plaintiff appealed would be irrelevant under the approach taken by the Sixth Circuit in these cases, that statement implies that the Eleventh Circuit would adopt the majority rule.

2. By contrast, as the Sixth Circuit noted in joining it, only the Seventh Circuit had previously held that the dismissal of a lawsuit counts as a "strike" for purposes of Section 1915(g) even while it is still pending on appeal. App., *infra*, 4a.

a. In *Robinson*, *supra*, the district court had granted the plaintiff leave to proceed *in forma pauperis* on appeal from a dismissal that would otherwise have

counted as the plaintiff's third "strike." 297 F.3d at 541. The Seventh Circuit ruled that "th[e] [district court's] authorization was contrary to the language of the statute" because the plaintiff already had two prior "strikes" and the dismissal constituted the plaintiff's third. *Ibid.* The Seventh Circuit held that a district court's dismissal immediately counts as a "strike," even before the plaintiff has had an opportunity to appeal that dismissal. *Ibid.*

The Seventh Circuit recognized that other circuits had reached the opposite result, but it chastised those courts for "refus[ing] to apply the statute literally." 297 F.3d at 541 (citing *Adepegba* and *Jennings*). Although the Seventh Circuit acknowledged that those courts had expressed a "legitimate" concern about "prevent[ing] [a] prisoner * * * from obtaining appellate review of the correctness of the ruling by the district court that resulted in his getting his third strike," it concluded that such a concern "does not require twisting the statute." *Ibid.* Instead, the court asserted, a plaintiff in that position could apply to the court of appeals for leave to proceed *in forma pauperis* on appeal, and the validity of the dismissal could be reviewed in that context. *Ibid.* The court reasoned that the contrary rule "has the anomalous result of allowing a prisoner to file, without payment, a frivolous appeal from his third strike." *Ibid.*

b. In adopting the majority rule, several courts of appeals have explicitly considered, and rejected, the Seventh Circuit's reasoning in *Robinson*. See, *e.g.*, *Henslee*, 681 F.3d at 541-542; *Silva*, 658 F.3d at 1099 n.5; *Thompson*, 492 F.3d at 433. Others have more broadly considered, and rejected, the "hyper-literal" textual interpretation adopted by the Seventh Circuit in *Robinson* (and by the Sixth Circuit in these cases). See, *e.g.*, *Ball*,

726 F.3d at 465; *Jennings*, 175 F.3d at 780; *Adepegba*, 103 F.3d at 387-388.

As matters currently stand, therefore, a district court's dismissal of a prisoner's lawsuit immediately counts as a "strike," regardless of any appeal, in the Sixth and Seventh Circuits; would not count as a "strike" until the prisoner has exhausted or forfeited appellate review in the First, Third, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits; and would likely not count as a "strike" until the prisoner has exhausted or forfeited appellate review in the Second, Fourth, and Eleventh Circuits. The resulting conflict is deeply entrenched and warrants this Court's review.

B. The Question Presented Is An Important And Recurring One That Warrants Review In These Cases

The question presented in these cases is a recurring one of substantial legal and practical importance. The applicability of the "three strikes" provision to suits brought by prisoners arises with great frequency. Yet the courts of appeals are intractably divided on the fundamental question whether the dismissal of a prisoner's suit must be final on appeal in order to count as a "strike" in the first place. These cases present the Court with an excellent and rare opportunity to resolve the conflict on that question.

1. The question presented implicates prisoners' fundamental right of access to the courts. See, *e.g.*, *Bounds* v. *Smith*, 430 U.S. 817, 821-822 (1977). This Court has long stressed the important role that the federal *in forma pauperis* statute plays in guaranteeing meaningful access to the courts for indigent litigants. See, *e.g.*, *Denton* v. *Hernandez*, 504 U.S. 25, 31 (1992); *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948). Because of the circuit conflict on the question presented,

however, there is a lack of uniformity concerning the ability of indigent prisoners to obtain further access to the federal courts: prisoners in the Sixth and Seventh Circuits are denied access in circumstances where similarly situated prisoners in the majority of other circuits are not.

Beyond the lack of uniformity, moreover, the interpretation of Section 1915(g) adopted by the Sixth and Seventh Circuits threatens to deprive prisoners with potentially meritorious claims of meaningful access to the courts. As this Court has noted, in enacting the PLRA, Congress sought to balance the need to facilitate consideration of meritorious claims by prisoners in the federal courts with the need to restrict the repeated filing of nonmeritorious claims. See, *e.g.*, *Jones*, 549 U.S. at 203-204. In light of its desire to balance those interests, "Congress could not have intended that dismissals would count as strikes immediately." App., *infra*, 10a (Daughtrey, J., dissenting). Interpreting Section 1915(g) to require that a dismissal be final on appeal before it can count as a "strike" "not only respects Congress' intent to curb meritless lawsuits, but ensures that meritorious lawsuits are not swept away in the process." *Silva*, 658 F.3d at 1100 (citation omitted).

Not only is the question presented in these cases of exceptional importance, but it recurs with great frequency. It is no coincidence that, in the less than two decades since the PLRA was enacted, all twelve of the regional circuits have spoken to the question presented in some fashion. Complaints by prisoners challenging prison conditions or claiming civil-rights violations account for approximately 9% of all civil cases in the federal system nationwide (excluding habeas petitions). See United States Courts, *Judicial Facts and Figures 2012*, tbl. 4.4 <tinyurl.com/civilcasesfiledtable>. As the cases dis-

cussed above illustrate, a prisoner filing such a complaint will often have one or more prior dismissals that are still pending on appeal at the time of filing. Whether or not those dismissals count as "strikes," in turn, will usually be dispositive of the prisoner's ability to proceed with his complaint. It thus cannot seriously be disputed that the question presented is an important and recurring one that warrants this Court's review.

2. These cases, moreover, constitute an ideal vehicle in which to consider and resolve the question presented. In each case, the dismissal that would have counted as petitioner's third "strike" was still on appeal when petitioner filed the instant complaint. See App., *infra*, 4a, 28a, 38a, 48a. And in each case, the instant complaint was unrelated to any of the complaints whose dismissals constituted the potential "strikes" against petitioner. See *id.* at 3a-4a, 27a-28a, 37a-38a, 47a-48a. That is the paradigmatic fact pattern of the cases in the circuit conflict. See, *e.g.*, *Ball*, 726 F.3d at 465-466; *Silva*, 658 F.3d at 1098; *Campbell*, 471 F.3d at 953; *Jennings*, 175 F.3d at 779-780. These cases therefore cleanly and squarely present the question whether a dismissal counts as a "strike" while it is still pending on appeal, free of any additional complication that might arise where the dismissal is potentially being counted as a "strike" *on appeal in the same case*. Cf. *Henslee*, 681 F.3d at 543 (holding that treating such a dismissal as a "strike" would contravene the discrete statutory requirement that the prisoner have brought the action or appeal giving rise to the "strike" on a "prior occasion[]").

3. The Court should take this opportunity to resolve the circuit conflict for two additional reasons.

a. No benefit would be served by allowing further percolation in the lower courts because the arguments on both sides of the conflict are so well developed. As noted

above, all twelve of the regional courts of appeals have spoken to the question presented in some fashion. And while courts often address prisoners' entitlement to *in forma pauperis* status in opinions or orders containing little analysis, the opinions in the conflict—especially the majority and dissenting opinions below in *Tollefson* and from the Ninth Circuit in *Silva*—comprehensively set out the arguments on both sides. The likelihood of further meaningful development in the law on the question presented is therefore slim.

b. Finally, these cases present a surprisingly rare opportunity for the Court to resolve the question presented. Although there have been numerous court of appeals decisions addressing the question, we are unaware of any previous petitions for certiorari that have raised it.[4] And of course, the overwhelming majority of cases presenting this question will involve prisoners who are proceeding without the assistance of counsel. See United States Courts, *Judicial Facts and Figures 2012*, tbls. 2.3 & 2.4 <tinyurl.com/2012appealsfiledbytype; tinyurl.com/2012proseappeals> (showing that 90.4% of civil appeals filed by prisoners are pro se, compared with 35.5% of civil appeals filed by non-prisoners). Here, petitioner is represented by counsel and the question has been thoroughly addressed by the lower courts, making these cases an optimal vehicle in which to decide the question.

In sum, the Sixth Circuit's decision deepens a widely recognized conflict on the question presented; that question is an undeniably important and recurring one; these

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[4] The petition for certiorari in *Ball* raised a distinct question concerning whether a dismissal on certain grounds could count as a "strike." See Pet. at i, *Ball*, *supra* (No. 13-8254).

cases constitute an ideal vehicle in which to consider the question; and it is far from clear when, if ever, the Court would have another opportunity to address the question if it denies review here. Accordingly, the Court should grant the petition for certiorari and resolve the conflict on the proper interpretation of the "three strikes" provision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1502

ANDRE LEE COLEMAN, NAMED AS "ANDRE LEE COLEMAN-BEY" ON COMPLAINT,
Plaintiff-Appellant

v.

TODD TOLLEFSON, ET AL., Defendants-Appellees.

Decided and Filed: October 23, 2013

Before: BATCHELDER, Chief Judge; DAUGHTREY and ROGERS, Circuit Judges.

ROGERS, J., delivered the opinion of the court, in which BATCHELDER, C. J., joined. DAUGHTREY, J. delivered a separate dissenting opinion.

OPINION

ROGERS, Circuit Judge.

Under the three-strikes provision of the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g), the district court in this case properly denied pauper status to plaintiff André Lee Coleman-Bey in his civil suit, even

though one of his three previous case dismissals ("strikes") was still on appeal when this case was brought. This counting of a third dismissal still on appeal as a strike does not lead to the anomalous conclusion that the third dismissal was itself precluded from being appealed by the three-strikes rule. The district court therefore properly dismissed this case for failure to pay court fees in the absence of pauper status.

Coleman-Bey, pro se, filed a complaint in the Western District of Michigan alleging claims under 42 U.S.C. § 1983 against six workers at the Baraga Correctional Facility. He also moved for leave to proceed in forma pauperis. The district court denied that motion on the grounds that Coleman-Bey was barred from receiving pauper status under the three-strikes provision of the PLRA. *Coleman v. Tollefson*, No. 2:10-cv-337, 2011 WL 573590, at *2 (W.D. Mich. Feb. 15, 2011). The court also ordered Coleman-Bey to pay the $350 filing fee within twenty-eight days. *Id.* After twenty-eight days passed and Coleman-Bey failed to pay the fee, the court dismissed the action. Coleman-Bey subsequently moved for leave to proceed in forma pauperis on appeal, which the district court granted. This appeal followed.

The district court properly relied on the three-strikes provision of the PLRA, which prohibits prisoners who have brought multiple frivolous appeals from receiving pauper status:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed

> on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). Each of the three civil cases that Coleman-Bey had previously filed while incarcerated counts as a strike under the PLRA.

First, *Coleman v. Lentin*, No. 2:92-cv-120 (W.D. Mich. Aug. 31, 1992), qualifies as a strike because the docket clearly indicates that when the district judge adopted the report and recommendation of the magistrate judge and dismissed the case, he did so because he found Coleman-Bey's complaint to be "frivolous and without merit." Coleman-Bey argues that the dismissal of *Coleman v. Lentin* does not qualify as a strike because the district court failed to follow various procedural requirements outlined in *Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983), in particular the requirement that before dismissing a complaint the court must permit the petitioner to amend his complaint to correct any defects. However, the PLRA generally overruled the set of procedures outlined in *Tingler*, including the requirement that Coleman-Bey claims was violated. *See Palacio v. Hofbauer*, 106 Fed. App'x. 1002, 1005 (6th Cir. 2004). Under the PLRA, a court may dismiss an action that it finds "frivolous or malicious" without permitting the plaintiff to amend the complaint. *LaFountain v. Henry*, 716 F.3d 944, 951 (6th Cir. 2013); *see also* 28 U.S.C. § 1915(e)(2).

Second, the dismissal of *Coleman v. Kinnunen*, No. 2:05-CV-256, 2008 WL 724780 (W.D. Mich. Mar. 17, 2008), counts as a strike because it was dismissed for

failure to state a claim. Coleman-Bey argues that the dismissal of this complaint does not count as a strike because it is not a dismissal for "failure to state a claim" but rather an order granting summary judgment for absence of material issues of fact. The order of the district court, however, clearly enough indicates that the dismissal was made pursuant to a Rule 12(b)(6) motion to dismiss for failure to state a claim. Section 1915(g)'s language was clearly modeled after Rule 12(b)(6), and dismissals pursuant to that rule count as a strike. *See Thompson v. DEA*, 492 F.3d 428, 437–38 (D.C. Cir. 2007). The issue of whether an adverse summary judgment may be a strike is not before us.

Third, *Coleman v. Sweeney*, No. 2:09-cv-178, 2009 WL 3270006 (W.D. Mich. Oct. 8, 2009), counts as a strike, even though the district court's order in that case was on appeal at the time that the instant suit was brought. A literal reading of § 1915(g) requires district courts to count as strikes cases that are dismissed on the grounds enumerated in the provision even when pending on appeal. The Seventh Circuit so reasoned in *Robinson v. Powell*, 297 F.3d 540, 541 (7th Cir. 2002). See also our unpublished order in *Shavers v. Stasewich*, No. 09-1740 (6th Cir. Oct. 22, 2009), in which we rejected the plaintiff's argument that the district court erred in denying him pauper status because one of the dismissals that the district court counted as a strike was still pending on appeal. We reasoned that, because § 1915(g) "does not say that the dismissal must be final in all of the courts of the United States," the district court had not erred in counting the case pending on appeal as a strike under the PLRA.

Not only does this rule follow the plain meaning of the statute, but it is also consistent with how judgments are treated for purposes of res judicata. Under that doctrine, cases on appeal have preclusive effect until they are reversed or vacated. *See In re Dublin Sec., Inc.*, 133 F.3d 377, 381 (6th Cir. 1997).

We recognize that several circuits have held that dismissal does not count as a strike until the litigant has exhausted or waived his appellate rights. *See Henslee v. Keller*, 681 F.3d 538, 541 (4th Cir. 2012); *Silva v. Di Vittorio*, 658 F.3d 1090, 1100 (9th Cir. 2011); *Smith v. Veterans Admin.*, 636 F.3d 1306, 1310–11 (10th Cir. 2011); *Thompson v. DEA*, 492 F.3d 428, 432 (D.C. Cir. 2007); *Nicholas v. Am. Detective Agency*, 254 Fed. Appx. 116, 116 (3d Cir. 2007) (per curiam); *Campbell v. Davenport Police Dep't*, 471 F.3d 952, 953 (8th Cir. 2006) (per curiam); *Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996); *see also Chavis v. Chappius*, 618 F.3d 162, 169 (2d Cir. 2010) (reserving judgment on whether an appealed dismissal may be a strike, but suggesting that denying an appeal of a third strike would be an illogical result).

Many of these cases rely on the unfounded concern that treating an appealed dismissal as a strike would preclude that very appeal. They reason that such a result would be a departure from the usual practice under the Federal Rules of Civil Procedure, which is to grant all litigants an appeal as of right from all final district court decisions. *See, e.g.*, *Silva*, 658 F.3d at 1098–99. In *Thompson*, 492 F.3d at 432, the D.C. Circuit asserted that counting a third strike while it is on appeal "would, within those narrow set of cases in which the third strike is appealed, effectively eliminate our appellate function."

The Fifth and Ninth Circuits also warned against a "hyper-literal reading of the statute [that] might bar a prisoner's appeal of an erroneous third strike." *Silva*, 658 F.3d at 1099 (quoting *Adepegba v. Hammons*, 103 F.3d 383, 388 (5th Cir. 1996)). The Fifth Circuit has also suggested that to prevent the appeal of the third strike would violate Congress's purpose "only to penalize litigation that is truly frivolous, not to freeze out meritorious claims or ossify district court errors." *Adepegba*, 103 F.3d at 387–88. All of these rationales assume that to make a strike effective immediately upon dismissal at the district court level would preclude the prisoner from pursuing the appeal of that dismissal in forma pauperis.

The concern about this anomalous result is not warranted, however, because the third strike may be appealed even though it would count as a strike with regard to a fourth or successive suit. The statute states that the bar on in forma pauperis actions is only triggered when "the prisoner has, on 3 or more *prior occasions* brought an action or appeal that was dismissed" because it was frivolous, malicious, or failed to state a claim. 28 U.S.C. § 1915(g) (emphasis added). A third strike that is on appeal is not a *prior* occasion for the purposes of that appeal, because it is the *same* occasion. In Coleman-Bey's case, however, *Coleman v. Sweeney* is a "prior occasion" because the present action is a new and distinct action. It counts as a strike because it is an action that was dismissed on a prior occasion for failure to state a claim. This reasoning remains true to the statute and directly addresses the concern of some of our sister circuits regarding the appeal of the third strike.

The dismissal of *Coleman v. Sweeney*, never reversed, accordingly counted as a strike continually from when it was entered. We therefore do not rely on the fact that the dismissal had been affirmed by the time that the court denied in forma pauperis status, nor do we address the relevance of that fact. Coleman-Bey had three effective strikes both when he filed his case and when his in forma pauperis status was denied, and was thus prohibited by § 1915(g) from bringing this action in forma pauperis.

AFFIRMED.

DISSENT

DAUGHTREY, Circuit Judge, dissenting.

This appeal presents an issue that the Sixth Circuit has not addressed previously in a published opinion: whether a cause of action's dismissal that still is on appeal nevertheless can constitute a "strike" for purposes of the "three-strikes" provision of the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915(g).[1] All but one of

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[1] We, however, have addressed this question in two unpublished orders that provide little guidance because they reach diametrically opposed conclusions. In *Nali v. Caruso*, No. 08-2083 (6th Cir. Apr. 15, 2009), a panel of this court asserted, "Under § 1915(g), an appeal from a third frivolous suit must be final before the third suit in district court may be counted as a strike[.]" We therefore vacated a district court order that counted a non-final dismissal as a strike, and remanded the matter to the district court to "consider Nali's claims on the merits." *Id.* Sixth months later, a different panel reached the opposite conclusion. In *Shavers v. Stasewich*, No. 09-1740 (6th Cir. Oct. 22, 2009), the panel rejected the plaintiff's argument that the district court erred in denying him *in forma pauperis* status because one of the dismissals that the district court counted

our sister circuit courts that have addressed the issue have concluded that an order of dismissal must be final before it may count as a "strike" that cuts off a prisoner's right to challenge constitutional violations in most instances. Because I believe that approach is the better response to the question, I respectfully dissent from the majority's contrary conclusion.

One of the earliest opinions interpreting the three-strikes provision of section 1915(g) was issued by the Fifth Circuit shortly after the PLRA was enacted. In *Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996), the court held that "[a] dismissal should not count against a petitioner [as a strike under the PLRA] until he has exhausted or waived his appeals." In the ensuing 17 years, all but one of the circuit courts addressing the issue have followed suit, either by explicitly adopting *Adepegba*'s conclusion or by indicating that this majority rule presumptively should apply. *See, e.g.*, *Ball v. Famiglio*, 726 F.3d 448, 465 (3d Cir. 2013); *Henslee v. Keller*, 681 F.3d 538, 543–44 (4th Cir. 2012); *Silva v. Di Vittorio*, 658 F.3d 1090, 1100 (9th Cir. 2011); *Smith v. Veterans Admin.*, 636 F.3d 1306, 1310–11 (10th Cir. 2011); *Chavis v. Chappius*, 618 F.3d 162, 169 (2d Cir. 2010); *Thompson v. Drug Enforcement Admin.*, 492 F.3d 428, 432–33 (D.C. Cir. 2007); *Campbell v. Davenport Police Dep't*, 471 F.3d 952, 953 (8th Cir. 2006);

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as a strike was still pending on appeal. That panel concluded that, because "[t]he statute [section 1915(g)] does not say that the dismissal must be 'final' in all of the courts of the United States," the district court had not erred in counting the case pending on appeal as a strike under the PLRA. *Id.* In the case now before us, the majority opinion follows this latter reasoning and thus reaches the same result as was reached in *Shavers*.

Michaud v. City of Rochester, No. 00-1263, 2000 WL 1886289, at *2 n.1 (1st Cir. Dec. 27, 2000) (unpublished). To date, only the Seventh Circuit has offered a different interpretation of the statute. It alone has concluded that a literal reading of the provision requires district courts to count as strikes, for purposes of the PLRA, cases that are dismissed on the grounds enumerated in section 1915(g) even while pending on appeal. *Robinson v. Powell*, 297 F.3d 540, 541 (7th Cir. 2002) (arguing that the majority rule reflects a "refus[al] to apply the statute literally").

I find the reasoning that has led the great majority of circuits to conclude that dismissals count as strikes under the PLRA only when those dismissals have become final—*i.e.*, when the plaintiff has exhausted or waived his appellate rights—both more compelling and more fair. Although the Seventh Circuit and, now, my colleagues in this case argue that the majority rule distorts the plain meaning of the PLRA, the Ninth Circuit has pointed out that "[s]ection 1915(g) does not expressly state whether a prior dismissal of 'an action or appeal' must be final before it can be considered a 'strike. . . .'" *Silva*, 658 F.3d at 1098. Instead, section 1915(g) states simply that a prisoner who, on "3 or more prior occasions" brought an action or appeal "that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted," cannot be accorded *in forma pauperis* status "unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

Thus, as the Fourth Circuit has noted, the statute is ambiguous, not only with respect to when dismissals should count as strikes but also with respect to what counts as a "prior occasion." *Henslee*, 681 F.3d at 542

(noting that the term "prior occasion" "may refer to a single moment or to a continuing event: to an appeal, independent of the underlying action, or to the continuing claim, inclusive of both the action and its appeal"). Hence, there are as many as three possible readings of what counts as a strike: (1) a suit dismissed under § 1915(g); (2) a suit dismissed under § 1915(g) but only after an appeal of that ruling has been waived or exhausted; (3) an appeal dismissed as frivolous, regardless of the ruling below. Given this statutory ambiguity, it is proper for us to interpret the meaning of the statute in light of its history and purpose. *See Blum v. Stenson*, 465 U.S. 886 (1984) ("Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.").

The overwhelming majority of other circuits have concluded that Congress could not have intended that dismissals would count as strikes immediately, given Congress's concern with fostering meritorious prisoner suits and preventing frivolous ones. "It is uncontroversial from the plain language of the statute that Congress intended section 1915(g) only to penalize litigation that is truly frivolous, not to freeze out meritorious claims or ossify district court errors." *Adepegba*, 103 F.3d at 388. *See also Jones v. Bock*, 549 U.S. 199, 204 (2007) (noting that the reforms in the PLRA were "designed to filter out the bad claims and facilitate consideration of the good"). Construing section 1915(g) to require courts to count dismissals as strikes even when pending on appeal could potentially bar the filing of meritorious claims and preserve district court errors by preventing prisoners from bringing claims in federal court while one or more

of their first three dismissals were being reversed on appeal. *See Adepegba*, 103 F.3d at 387–88. *See also Thompson*, 492 F.3d at 432 (noting that an interpretation of the statute that counted dismissals as strikes even prior to appeal "would, within those narrow set of cases in which the third strike is appealed, effectively eliminate our appellate function," and concluding that "[h]ad Congress intended such an unusual result, it would have clearly said so"); *Silva*, 658 F.3d at 1098–99 (recognizing that, because the minority view represents a departure from the usual practice under 28 U.S.C. § 1291 and the Federal Rules of Appellate Procedure that grants all litigants an appeal as of right from final district court decisions, "Congress's silence on this issue is 'strong evidence that the usual practice should be followed. '" (quoting *Jones*, 549 U.S. at 212)).

Nevertheless, my colleagues in this case suggest that prisoners attempting to appeal a third dismissal for filing an allegedly frivolous complaint would not necessarily suffer the hardships envisioned by the decisions in *Jones*, *Adepegba*, and *Thompson*. Specifically, they maintain, in cases where a prisoner seeks to appeal his third strike but is without funds to proceed unless accorded pauper status, that prisoner still may obtain appellate review of that dismissal by filing, pursuant to Federal Rule of Appellate Procedure 24(a)(5), a motion seeking leave from the appellate court to proceed *in forma pauperis* on appeal. In resolving the prisoner's Rule 24(a)(5) motion, so goes the argument, the appellate court could review the merits of the district court decision to determine whether "the district court might have erred" in dismissing the suit as frivolous, malicious, or meritless. *See Robinson*, 297 F.3d at 541.

This alternative is far from satisfying. For one thing, it threatens to make the resolution of a Rule 24(a)(5) motion more complex and involved than it is at present. *See Thompson*, 492 F.3d at 433 (quoting claim in government brief that the Seventh Circuit approach "creat[es] more work than is appropriate for either the courts or the litigants to resolve a request for [*in forma pauperis*] privileges"). Furthermore, this alternative fails to provide any relief for litigants like Coleman who seek pauper status to litigate an unrelated case rather than to appeal a third dismissal decision. By following the majority's lead in this case, the only way we could ensure that Coleman was not precluded erroneously from proceeding *in forma pauperis* in district court would be to conduct our own merits analysis of the prior dismissal currently pending on appeal before (presumably) a different panel of this court. Obviously, such a proposed solution to the problem is unwieldy, problematic, and creates unnecessary, extra work for the courts.

Because I would hold that dismissals of causes of action do not count as strikes under the PLRA until the prisoner-plaintiffs have exhausted or waived their appeals, I also would decide at precisely what point in the litigation process the finality of any prior dismissals should be assessed. Our sister circuits have differed somewhat in the approaches they have taken to this timing question. The Third Circuit has held that the language of section 1915(g) suggests that a prisoner's status under the statute should be assessed as of the date the latest complaint is filed. *See Gibbs v. Ryan*, 160 F.3d 160, 162 (3d Cir. 1998) (noting that section 1915(g) applies to prisoners who "*bring* a civil action or appeal a judgment in a civil action or proceeding" and that "[i]n the context of filing a civil action, 'bring' ordinarily refers to the 'ini-

tiation of legal proceedings in a suit'") (emphasis added)). Most of the circuits that have adopted the majority view set forth in *Adepegba* agree. *See, e.g.*, *Silva*, 658 F.3d at 1100 ("Section 1915(g) does not apply unless the inmate litigant has three strikes at the time he files his lawsuit or appeal." (quoting *Campbell*, 471 F.3d at 952)). However, at least one circuit has suggested that a prisoner's status under the three-strikes provision should be assessed *after* litigation has commenced—presumably at the point the district court grants or denies the motion for pauper status. *See Jennings v. Natrona Cnty. Det. Ctr. Med. Facility*, 175 F.3d 775, 779 (10th Cir. 1999) (refusing to count as a strike a dismissal that was appealed after the plaintiff filed his complaint in the subsequent case).

In light of the relevant statutory language, and given the ease in applying the rule adopted by the majority of other circuits, I would adopt the view that the question whether a prior dismissal is final should be assessed as of the date of the filing of the complaint or notice of appeal. Adopting this timing rule also would reduce the possibility that litigants could seek to manipulate the judicial calendar to advance their own positions. In the present case, however, whether Coleman's pauper status should have been assessed as of the date he filed his new, fourth complaint or the date the district court resolved his motion for pauper status in that proceeding is irrelevant. The plaintiff's latest cause of action against the correctional-facility defendants was filed in December 2010, well before the district court denied his *in forma pauperis* request in February 2011 or this court affirmed the dismissal of his prior, third civil-rights complaint in March 2011.

I would hold that the proper interpretation of § 1915(g) is the one adopted by the majority of circuits, rather than that proposed by the majority in this case. I thus respectfully dissent and would conclude that the district court should have granted Coleman's motion to proceed *in forma pauperis* on his complaint against these defendants because, at the time Coleman filed that cause of action, he had not yet received the three *final* "strikes" that subsequently cut off his ability to petition the federal courts for redress of grievances.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1502

ANDRE LEE COLEMAN, NAMED AS "ANDRE LEE COLEMAN-BEY" ON COMPLAINT,
Plaintiff-Appellant,

v.

TODD TOLLEFSON, ET AL., Defendants-Appellees.

Filed: January 17, 2014

ORDER

BEFORE: BATCHELDER, Chief Judge; DAUGHTREY and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the peti-

tion were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Daughtrey would grant rehearing for the reasons stated in her dissent. However, the panel replaces the last two sentences of the first paragraph on page 3 of the opinion:

"Under the PLRA, a court must dismiss an action that it finds "frivolous or malicious" sua sponte, without permitting the plaintiff to amend the complaint. *McGore v. Wrigglesworth*, 114 F.3d 601, 612 (6th Cir. 1997), *overruled on other grounds by Jones v. Bock*, 549 U.S. 199 (2007); *see also* 28 U.S.C § 1915(e)(2)."

The new language:

"Under the PLRA, a court may dismiss an action that it finds "frivolous or malicious" without permitting the plaintiff to amend the complaint. *LaFountain v. Henry*, 716 F.3d 944, 951 (6th Cir. 2013); *see also* 28 U.S.C. § 1915(e)(2)."

A corrected opinion will issue forthwith.

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt
Deborah S. Hunt
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 10-cv-337

ANDRE LEE COLEMAN, Plaintiff,

v.

TODD A. TOLLEFSON ET AL., Defendants.

February 15, 2011

OPINION DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS*—THREE STRIKES

EDGAR, District Judge.

Plaintiff Andre Lee Coleman, a prisoner incarcerated at Baraga Maximum Correctional Facility, filed a complaint pursuant to 42 U.S.C. § 1983. Plaintiff seeks leave to proceed *in forma pauperis*. Because Plaintiff has filed at least three lawsuits that were dismissed as frivolous, malicious or for failure to state a claim, he is barred from proceeding *in forma pauperis* under 28 U.S.C. § 1915(g). The Court will order Plaintiff to pay the $350.00 civil action filing fee within twenty-eight (28) days of this opinion and accompanying order, and if Plaintiff fails to do so, the Court will order that his action be dismissed

without prejudice. Even if the case is dismissed, Plaintiff will be responsible for payment of the $350.00 filing fee in accordance with *In re Alea*, 286 F.3d 378, 380–81 (6th Cir. 2002).

Discussion

The Prison Litigation Reform Act (PLRA), Pub.L. No. 104-134, 110 Stat. 1321 (1996), which was enacted on April 26, 1996, amended the procedural rules governing a prisoner's request for the privilege of proceeding *in forma pauperis*. As the Sixth Circuit has stated, the PLRA was "aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts." *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997). For that reason, Congress put into place economic incentives to prompt a prisoner to "stop and think" before filing a complaint. *Id.* For example, a prisoner is liable for the civil action filing fee, and if the prisoner qualifies to proceed *in forma pauperis*, the prisoner may pay the fee through partial payments as outlined in 28 U.S.C. § 1915(b). The constitutionality of the fee requirements of the PLRA has been upheld by the Sixth Circuit. *Id.* at 1288.

In addition, another provision reinforces the "stop and think" aspect of the PLRA by preventing a prisoner from proceeding *in forma pauperis* when the prisoner repeatedly files meritless lawsuits. Known as the "three-strikes" rule, the provision states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under [the section governing proceedings *in forma pauperis*] if the prisoner has, on 3 or more

> prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). The statutory restriction "[i]n no event," found in § 1915(g), is express and unequivocal. The statute does allow an exception for a prisoner who is "under imminent danger of serious physical injury." The Sixth Circuit has upheld the constitutionality of the "three-strikes" rule against arguments that it violates equal protection, the right of access to the courts, and due process, and that it constitutes a bill of attainder and is *ex post facto* legislation. *Wilson v. Yaklich*, 148 F.3d 596, 604–06 (6th Cir. 1998); *accord Rodriguez v. Cook*, 169 F.3d 1176, 1178–82 (9th Cir. 1999); *Rivera v. Allin*, 144 F.3d 719, 723–26 (11th Cir. 1998); *Carson v. Johnson*, 112 F.3d 818, 821–22 (5th Cir. 1997).

Plaintiff has been an active litigant in the federal courts in Michigan. The Court has dismissed at least three of Plaintiff's lawsuits for failure to state a claim. *See Coleman v. Sweeney et al.*, 2:09-cv-178 (W.D. Mich. Oct. 8, 2009); *Coleman v. Kinnunen*, No. 2:05-cv-256 (W.D. Mich. Mar. 17, 2008); *Coleman v. Lentin et al.*, 2:92-cv-120 (W.D. Mich. Aug. 31, 1992). Although one of the dismissals was entered before enactment of the PLRA on April 26, 1996, the dismissal nevertheless counts as strikes. *See Wilson*, 148 F.3d at 604. Moreover, Plaintiff's allegations do not fall within the exception to the three-strikes rule because he does not allege any

facts establishing that he is under imminent danger of serious physical injury.

In light of the foregoing, § 1915(g) prohibits Plaintiff from proceeding *in forma pauperis* in this action. Plaintiff has twenty-eight (28) days from the date of entry of this order to pay the entire civil action filing fee, which is $350.00. When Plaintiff pays his filing fee, the Court will screen his complaint as required by 28 U.S.C. § 1915A and 42 U.S.C. § 1997e(c). If Plaintiff fails to pay the filing fee within the 28-day period, his case will be dismissed without prejudice, but he will continue to be responsible for payment of the $350.00 filing fee.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 10-cv-337

ANDRE LEE COLEMAN, Plaintiff,

v.

TODD A. TOLLEFSON ET AL., Defendants.

April 12, 2011

ORDER ON MOTIONS

EDGAR, District Judge.

This is a civil rights action brought by a state prisoner pursuant to 42 U.S.C. § 1983. By opinion and order entered February 15, 2011 (dockets ##5-6), the Court denied Plaintiff leave to proceed *in forma pauperis* because he has "three strikes" within the meaning of 28 U.S.C. § 1915(g). Plaintiff has filed a motion to vacate the Court's order denying him leave to proceed *in forma pauperis* (docket #8), objections to the Court's order (docket #9), a "Motion to Make Findings of Facts and Law" (docket #10) and a supporting brief (docket #11). The Court construes Plaintiff's motions and objections as a motion for reconsideration. Under Rule 54(b) of the

Federal Rules of Civil Procedure, a non-final order is subject to reconsideration at any time before entry of a final judgment. *Id.*; *see also ACLU v. McCreary County*, 607 F.3d 439, 450 (6th Cir. 2010). Western District of Michigan Local Civil Rule 7.4(a) provides that "motions for reconsideration which merely present the same issues ruled upon by the Court shall not be granted." Further, reconsideration is appropriate only when the movant "demonstrate[s] a palpable defect by which the Court and the parties have been misled [and] that a different disposition must result from a correction thereof." *Id.*

In his supporting brief, Plaintiff contends that the Court relied upon three previously dismissed cases as strikes without making findings of fact to determine whether those cases actually constituted strikes under section 1915(g). Plaintiff further argues that the Court erred in counting those cases as strikes. For the reasons set forth below, Plaintiff's arguments are without merit.

Plaintiff concedes that *Coleman v. Sweeney et al.*, 2:09-cv-178 (W.D. Mich.) was dismissed on October 8, 2009, for failure to state a claim but appears to argue that the reasoning in the Court's opinion was not sufficient to support its determination. Contrary to Plaintiff's assertions, the court issued a twelve-page opinion analyzing each of Plaintiff's legal claims and concluding that he failed to state a claim upon which relief could be granted. A strike includes "an action or appeal in a court of the United States that was dismissed on the ground that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). Plaintiff cannot circumvent the three-strike provision by mounting a collateral attack upon the Court's decision.

Accordingly, the dismissal for failure to state a claim constitutes a strike under the plain language of the statute.

Plaintiff further argues that *Coleman v. Sweeney et al.*, 2:09-cv-178 (W.D. Mich.) cannot be counted as a strike because an appeal remains pending in the Sixth Circuit. The language of § 1915(g) is clear, and it does not make an exception for a dismissal that has been appealed. Congress could have included an exception for a dismissal that had been appealed, but did not. The only exception is when a prisoner is under imminent danger of serious physical injury. *Id.* Moreover, a judgment of dismissal by a district court is final and should be given full effect, unless stayed upon appeal. F.R. Civ. P 62; *see also National Labor Rel. Bd. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987) (pendency of an appeal does not disturb finality of a judgment). Plaintiff has not obtained a stay of the dismissal.

This Court declines to follow the decision of the Fifth Circuit in *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir. 1996). In *Adepegba*, the Fifth Circuit held that a dismissal by a district court should not be counted as a strike until the appeal was exhausted or waived. *Id.* at 387-88. The Fifth Circuit reasoned that to do so would pose "a risk of inadvertently punishing nonculpable conduct," hypothesizing that a fourth claim could expire while the three strikes were in the process of being reversed on appeal and furthermore, an appeal of an erroneous third strike could be barred because it would follow three dismissals. *Id.* The Fifth Circuit failed to cite any authority to support its conclusion in *Adepegba*. Neither of the foregoing concerns—the plain language of § 1915(g) and the finality of judgments—was mentioned in *Adepegba*.

Moreover, the Fifth Circuit's conclusion in *Adepegba* could eviscerate the purpose of § 1915(g) to deter abusive litigants. If the reasoning underlying *Adepegba* is followed, a plaintiff could avoid the effect of § 1915(g) by filing three frivolous lawsuits simultaneously and appealing each dismissal. The plaintiff could then continue to file frivolous lawsuits while the appeals were pending, without being subject to the constraints of § 1915(g). Because the filing fee requirements are triggered at the time the action is filed, the plaintiff could proceed *in forma pauperis* in each new lawsuit, even if the appeals were subsequently affirmed. The result could be a multitude of frivolous lawsuits, with no possibility of applying § 1915(g) to deter the frivolous litigation.

It goes without saying that Congress's intent in enacting § 1915(g) was not to encourage abusive litigants to file multiple lawsuits to avoid the application of § 1915(g). Consequently, the court concludes that where a plaintiff has had three lawsuits dismissed as defined in § 1915(g), a dismissal counts as a strike even if it is pending on appeal at the time that the plaintiff files his new action. Moreover, the Sixth Circuit affirmed the dismissal of Plaintiff's action in an order issued on March 29, 2011. *See Coleman v. Sweeney, et al.*, No. 09-2419 (6th Cir. Mar. 29, 2011).

Plaintiff also contends that *Coleman v. Kinnunen*, 2:05-cv-256 (W.D. Mich.) is not a strike because it was dismissed pursuant to a motion to dismiss brought under F.R. Civ. P. 12(b)(6). The language of Rule 12(b)(6), which permits dismissal for "failure to state a claim upon which relief can be granted," tracks the language of § 1915(g). When Congress uses the same language in two different statutory provisions, federal courts presume

Congress means the same thing in both statutes. Thus, this Court finds that the dismissal of Plaintiff's access to the courts claims under Rule 12(b)(6) for failing to state a claim constitutes a strike for purposes of § 1915(g). *See McLean v. U.S.*, 566 F.3d 391, 405 (4th Cir. 2009).

Plaintiff further asserts that *Coleman v. Lentin*, 2:92-cv-120 (W.D. Mich.) was not dismissed "for failure to state a claim" as stated in the Court's opinion denying him leave to proceed *in forma pauperis*, but was dismissed "as frivolous and without merit." This case was dismissed on August 31, 1992, before the PLRA was enacted in 1996. As discussed in the Court's previous opinion, dismissals entered before enactment of the PLRA nevertheless count as strikes. *See Wilson v. Yaklich*, 148 F.3d 596, 604 (6th Cir. 1998). In this case, the Court expressly dismissed the complaint as "frivolous," which constitutes a strike under § 1915(g). The fact that the Court used the words "and without merit" rather than "and for failure to state a claim" as an alternative ground for dismissal is without consequence. Thus, the Court properly counted the dismissal of this case as a strike.

In light of the foregoing, this Court finds no error in its decision denying Plaintiff leave to proceed *in forma pauperis* and Plaintiff's motion for reconsideration fails to meet the standard set forth by Rule 7.4(a). Therefore:

IT IS ORDERED that Plaintiff's motion to vacate the Court's order denying him leave to proceed *in forma pauperis* (docket #8), objections to the Court's order (docket #9) and "Motion to Make Findings of Facts and Law" (docket #10) are DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-1726

ANDRE LEE COLEMAN, Plaintiff-Appellant

v.

BERTINA BOWERMAN, Correctional Officer; KIMBERLY HILL, Correctional Officer; MARY BONEVILLE, Hearing Investigator, Defendants-Appellees.

January 10, 2014

ORDER

Andre L. Coleman, a pro se Michigan prisoner, moves the court to grant him permission to proceed in forma pauperis in his appeal from a district court order dismissing his civil complaint.

The complaint challenges alleged violations of Coleman's rights when he was imprisoned at the Alger Correctional Facility. Seeking monetary and equitable relief, Coleman sued correctional officers Bertina Bowerman and Kimberly Hill, and Hearing Investigator Mary Boneville. Coleman alleged that the defendants retaliated against him by threatening him with misconduct

charges based on the exercise of his rights under the grievance process and violated his due process rights by failing to provide him access to security videotapes.

The district court initially granted Coleman's request to proceed in forma pauperis. However, the district court subsequently granted the defendants' motion to revoke Coleman's pauper status because he has at least three prior cases that had been dismissed as frivolous or for failure to state a claim. *See Coleman v. Sweeney, et al.*, 2:09-cv-178 (W.D. Mich. Oct. 8, 2009); *Coleman v. Kinnunen*, No. 2:05-cv-256 (W.D. Mich. Mar. 17, 2008); *Coleman v. Lentin, et al.*, 2:92-cv-120 (W.D. Mich. Aug. 31, 1992). The district court instructed Coleman to pay his filing fee within twenty-eight days of its order, and warned him that failure to comply would result in the dismissal of his complaint. Subsequently, the district court dismissed Coleman's complaint, without prejudice, because he had not paid the filing fee. The district court also denied Coleman permission to proceed in forma pauperis on appeal.

An appeal in this case would be frivolous as it lacks an arguable basis in law. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Callihan v. Schneider*, 178 F.3d 800, 804 (6th Cir. 1999).

The district court properly denied Coleman's application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(g). The "three strikes" provision of § 1915(g) provides that:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or de-

> tained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

The district court determined that Coleman had previously filed three complaints that had been dismissed as frivolous. Although Coleman argued that the dismissal of *Coleman v. Sweeney* does not constitute a "strike" because his appeal from the dismissal of that case was still pending when the district court denied his application for in forma pauperis status, this court has recently held that a dismissal of a case for failure to state a claim qualifies as a "strike" even if the appeal from the dismissal is pending at the time a prisoner files a new complaint. *Coleman v. Tollefson*, 733 F.3d 175, 177 (6th Cir. 2013). A review of the other dismissals reflect that *Coleman v. Kinnunen* was dismissed for failure to state a claim and that *Coleman v. Lentin, et al.* was dismissed as frivolous. In addition, Coleman did not allege any facts to establish that he is in imminent danger of serious physical injury, and thus he does not fit within the exception to the statutory mandate that prohibits him from proceeding in forma pauperis in light of his three prior frivolity dismissals. Therefore, the district court properly dismissed Coleman's complaint for failure to pay the filing fee in the absenceof pauper status.

Accordingly, the motion for in forma pauperis status is hereby denied pursuant to 28 U.S.C. § 1915(a)(3). Coleman is directed to pay the appellate filing fee of $455

in full with the district court within 30 days of the filing date of this order, or else this appeal will be dismissed for lack of prosecution.

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-1726

ANDRE LEE COLEMAN, Plaintiff-Appellant

v.

BERTINA BOWERMAN, Correctional Officer; KIMBERLY HILL, Correctional Officer; MARY BONEVILLE, Hearing Investigator, Defendants-Appellees

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February 19, 2014

ORDER

Appellant having previously been advised that failure to satisfy certain specified obligations would result in dismissal of the case for want of prosecution and it appearing that the appellant has failed to satisfy the following obligation(s):

The proper fee was not paid by February 10, 2014.

It is therefore **ORDERED** that this cause be, and it hereby is, dismissed for want of prosecution.

ENTERED PURSUANT TO RULE 45(a), RULES OF THE SIXTH CIRCUIT

Deborah S. Hunt, Clerk

Issued: February 19, 2014 s/Deborah S. Hunt

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 10-cv-322

ANDRE LEE COLEMAN, Plaintiff,

v.

BERTINA M. BOWERMAN, Defendants.

March 16, 2012

Before: EDGAR, District Judge.

MEMORANDUM OPINION REVOKING LEAVE TO PROCEED *IN FORMA PAUPERIS*—THREE STRIKES

Plaintiff Andre Lee Coleman, a prisoner incarcerated at Ionia Maximum Correctional Facility, filed a complaint pursuant to 42 U.S.C. § 1983. Plaintiff was granted leave to proceed *in forma pauperis*. Defendants have filed motions to revoke Plaintiff's pauper status (docket #10). Because Plaintiff has filed at least three lawsuits which were dismissed as frivolous or failing to state a claim, he is barred from proceeding *in forma pauperis* under 28 U.S.C. § 1915(g). The court will vacate the earlier order allowing Plaintiff to proceed *in forma*

pauperis and order Plaintiff to pay the civil action filing fee within twenty-eight (28) days of this opinion and accompanying order. If Plaintiff fails to do so, the court will order that his action be dismissed without prejudice.

The Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996), which was enacted on April 26, 1996, amended the procedural rules governing a prisoner's request for the privilege of proceeding *in forma pauperis*. As the Sixth Circuit has stated, the PLRA was "aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts." *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997). For that reason, Congress put into place economic incentives to prompt a prisoner to "stop and think" before filing a complaint. *Id.* For example, a prisoner is liable for the civil action filing fee, and if the prisoner qualifies to proceed *in forma pauperis*, the prisoner may pay the fee through partial payments as outlined in 28 U.S.C. § 1915(b). The constitutionality of the fee requirements of the PLRA has been upheld by the Sixth Circuit. *Id.* at 1288.

In addition, another provision reinforces the "stop and think" aspect of the PLRA by preventing a prisoner from proceeding *in forma pauperis* when the prisoner repeatedly files meritless lawsuits. Known as the "three-strikes" rule, the provision states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under [the section governing proceedings *in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in

> any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

The statutory restriction "[i]n no event," found in § 1915(g), is express and unequivocal. The statute does allow an exception for a prisoner who is "under imminent danger of serious physical injury." The Sixth Circuit has upheld the constitutionality of the "three-strikes" rule against arguments that it violates equal protection, the right of access to the courts, and due process, and that it constitutes a bill of attainder and is *ex post facto* legislation. *Wilson v. Yaklich*, 148 F.3d 596, 604-06 (6th Cir. 1998); *accord Pointer v. Wilkinson*, 502 F.3d 369, 377 (6th Cir. 2007) (citing *Wilson*, 148 F.3d at 604-06); *Rodriguez v. Cook*, 169 F.3d 1176, 1178-82 (9th Cir. 1999); *Rivera v. Allin*, 144 F.3d 719, 723-26 (11th Cir. 1998); *Carson v. Johnson*, 112 F.3d 818, 821-22 (5th Cir. 1997).

The docket sheets of each of the previously dismissed cases, and concludes that at least three previous dismissals qualify under section 1915(g): *Coleman v. Lentin*, No. 2:92-cv-120 (W.D. Mich. Aug. 31, 1992); *Coleman v. Kinnunen*, 2:05-cv-256 (W.D. Mich. Mar. 17, 2008); *Coleman v. Sweeney*, 2:09-cv-178 (W.D. Mich. Oct. 8, 2009). Judge Janet Neff of this court has previously determined that Plaintiff falls within this "three strikes" provision of section 1915(g) and has revoked *in forma pauperis* status on that basis. *Coleman v. Vroman*, No. 1:10-cv-354 (W.D. Mich. May 27, 2011). In her opinion

and order, Judge Neff analyzed and rejected each of Plaintiff's arguments as to why the same three cases cited above should not be considered as "strikes" under section 1915(g). On the present record, there can be no doubt that Plaintiff is subject to section 1915(g) because he has filed at least three lawsuits that were previously dismissed as frivolous, malicious, or for failure to state a claim.

Section 1915(g) grants an exemption for an inmate who is "under imminent danger of serious physical injury." To qualify under this exemption, a plaintiff must allege facts showing "real and proximate" danger that exists at the time the complaint is filed. *See Rittner v. Kinder*, 290 F App'x 796, 797-98 (6th Cir. 2008). A prisoner's assertion that he or she faced danger in the past is insufficient to invoke the exception. *Id.* In the present case, the facts alleged by Plaintiff do not establish imminent danger of serious physical injury. Plaintiff's claims concern retaliatory misconduct tickets and interference with his right of access to the courts.

In conclusion, section 1915(g) prohibits Plaintiff from proceeding *in forma pauperis* in this action. The court will vacate the order granting *in forma pauperis* status and require Plaintiff to pay the entire civil action filing fee, which is $350, within 28 days of the date of entry of this order. If Plaintiff fails to pay the filing fee within the 28-day period, his case will be dismissed without prejudice, but he will continue to be responsible for payment of the entire filing fee. *See In re Alea*, 286 F.3d 378, 380-81 (6th Cir. 2002).

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1678

ANDRE LEE COLEMAN, Plaintiff-Appellant

v.

STEVEN DYKEHOUSE, Case Manager; RONALD T. EMBRY, Resident Unit Manager; DEBRA OLGER, Corrections Officer; AND SAM NORMAN, Sergeant, Defendants-Appellees.

January 10, 2014

ORDER

Andre L. Coleman, a pro se Michigan prisoner, moves the court to grant him permission to proceed in forma pauperis in his appeal from a district court order dismissing his civil complaint.

Seeking monetary and equitable relief, Coleman, an inmate at the Ionia Correctional Facility, sued Case Manager Steven Dykehouse; Resident Unit Manager Ronald T. Embry; Correctional Officer Debra S. Olger; and Sergeant Sam Norman. Coleman alleged that the defendants interfered with his attempts to replace a radio that he had previously purchased after the handle

broke on the old radio by sabotaging his rights to a proper administrative hearing.

The district court denied Coleman permission to proceed in forma pauperis because he has at least three prior cases that had been dismissed as frivolous or for failure to state a claim. *See Coleman v. Sweeney, et al.*, 2:09-cv-178 (W.D. Mich. Oct. 8, 2009); *Coleman v. Kinnunen*, No. 2:05-cv-256 (W.D. Mich. Mar. 17, 2008); *Coleman v. Lentin, et al.*, 2:92-cv-120 (W.D. Mich. Aug. 31, 1992). The district court instructed him to pay his filing fee within twenty-eight days of its order, and warned him that failure to comply would result in the dismissal of his complaint. Coleman filed a motion for reconsideration, arguing that the dismissal of *Coleman v. Sweeney* does not constitute a "strike" because his appeal from the dismissal of that case was still pending when the district court denied his application for in forma pauperis status. He argued that, pursuant to the Fifth Circuit's holding in *Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996), a prior dismissal should not be counted as a strike until the litigant has had an opportunity to exhaust his appeal from the dismissal of his complaint. The district court denied the motion for reconsideration and dismissed Coleman's complaint, without prejudice, because he had not paid the filing fee. The district court denied Coleman permission to proceed in forma pauperis on appeal.

An appeal in this case would be frivolous as it lacks an arguable basis in law. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Callihan v. Schneider*, 178 F.3d 800, 804 (6th Cir. 1999).

The district court properly denied Coleman's application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(g). The "three strikes" provision of § 1915(g) provides that:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

The district court determined that Coleman had previously filed three complaints that had been dismissed as frivolous. Although Coleman argued that the dismissal of *Coleman v. Sweeney* does not constitute a "strike" because his appeal from the dismissal of that case was still pending when the district court denied his application for in forma pauperis status, this court has recently held that a dismissal of a case for failure to state a claim qualifies as a "strike" even if the appeal from the dismissal is pending at the time a prisoner files a new complaint. *Coleman v. Tollefson*, 733 F.3d 175, 177 (6th Cir. 2013). In addition, Coleman did not allege any facts to establish that he is in imminent danger of serious physical injury, and thus he does not fit within the exception to the statutory mandate that prohibits him from proceeding in forma pauperis in light of his three prior frivolity dismissals. Therefore, the district court properly dismissed

Coleman's complaint for failure to pay the filing fee in the absence of pauper status.

Accordingly, the motion for in forma pauperis status is hereby denied pursuant to 28 U.S.C. § 1915(a)(3). Coleman is directed to pay the appellate filing fee of $455 in full with the district court within 30 days of the filing date of this order, or else this appeal will be dismissed for lack of prosecution.

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt
Clerk

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11-1678

ANDRE LEE COLEMAN, Plaintiff-Appellant

v.

STEVEN DYKEHOUSE, Case Manager; RONALD T. EMBRY, Resident Unit Manager; DEBRA OLGER, Corrections Officer; SAM NORMAN, Sergeant, Defendants-Appellees

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February 11, 2014

ORDER

Appellant having previously been advised that failure to satisfy certain specified obligations would result in dismissal of the case for want of prosecution and it appearing that the appellant has failed to satisfy the following obligation(s):

The proper fee was not paid by February 10, 2014.

It is therefore **ORDERED** that this cause be, and it hereby is, dismissed for want of prosecution.

ENTERED PURSUANT TO RULE 45(a), RULES OF THE SIXTH CIRCUIT

Deborah S. Hunt, Clerk

Issued: February 11, 2014 s/Deborah S. Hunt

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 11-cv-108

ANDRE LEE COLEMAN, Plaintiff,

v.

STEVEN DYKEHOUSE, ET AL., Defendants.

March 9, 2011

Before: QUIST, District Judge.

OPINION DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS*—THREE STRIKES

Plaintiff Andre Lee Coleman, a prisoner incarcerated at Baraga Maximum Correctional Facility, filed a complaint pursuant to 42 U.S.C. § 1983. Plaintiff seeks leave to proceed *in forma pauperis*. Because Plaintiff has filed at least three lawsuits that were dismissed as frivolous, malicious or for failure to state a claim, he is barred from proceeding *in forma pauperis* under 28 U.S.C. § 1915(g). The Court will order Plaintiff to pay the $350.00 civil action filing fee within twenty-eight (28) days of this opinion and accompanying order, and if Plaintiff fails to do so, the Court will order that his action be dismissed

without prejudice. Even if the case is dismissed, Plaintiff will be responsible for payment of the $350.00 filing fee in accordance with *In re Alea*, 286 F.3d 378, 380-81 (6th Cir. 2002).

Discussion

The Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996), which was enacted on April 26, 1996, amended the procedural rules governing a prisoner's request for the privilege of proceeding *in forma pauperis*. As the Sixth Circuit has stated, the PLRA was "aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts." *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997). For that reason, Congress put into place economic incentives to prompt a prisoner to "stop and think" before filing a complaint. *Id.* For example, a prisoner is liable for the civil action filing fee, and if the prisoner qualifies to proceed *in forma pauperis*, the prisoner may pay the fee through partial payments as outlined in 28 U.S.C. § 1915(b). The constitutionality of the fee requirements of the PLRA has been upheld by the Sixth Circuit. *Id.* at 1288.

In addition, another provision reinforces the "stop and think" aspect of the PLRA by preventing a prisoner from proceeding *in forma pauperis* when the prisoner repeatedly files meritless lawsuits. Known as the "three-strikes" rule, the provision states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under [the section governing proceedings *in forma pauperis*] if the prisoner has, on 3 or more

> prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). The statutory restriction "[i]n no event," found in § 1915(g), is express and unequivocal. The statute does allow an exception for a prisoner who is "under imminent danger of serious physical injury." The Sixth Circuit has upheld the constitutionality of the "three-strikes" rule against arguments that it violates equal protection, the right of access to the courts, and due process, and that it constitutes a bill of attainder and is *ex post facto* legislation. *Wilson v. Yaklich*, 148 F.3d 596, 604-06 (6th Cir. 1998); *accord Rodriguez v. Cook*, 169 F.3d 1176, 1178-82 (9th Cir. 1999); *Rivera v. Allin*, 144 F.3d 719, 723-26 (11th Cir. 1998); *Carson v. Johnson*, 112 F.3d 818, 821-22 (5th Cir. 1997).

Plaintiff has been an active litigant in the federal courts in Michigan. The Court has dismissed at least three of Plaintiff's lawsuits for failure to state a claim. *See Coleman v. Sweeney et al.*, 2:09-cv-178, (W.D. Mich. Oct. 8, 2009); *Coleman v. Kinnunen*, No. 2:05-cv-256, (W.D. Mich. Mar. 17, 2008); *Coleman v. Lentin et al.*, 2:92-cv-120 (W.D. Mich. Aug. 31, 1992). Although one of the dismissals was entered before enactment of the PLRA on April 26, 1996, the dismissal nevertheless counts as strikes. *See Wilson*, 148 F.3d at 604. Moreover, Plaintiff's allegations do not fall within the exception to the three-strikes rule because he does not allege any

facts establishing that he is under imminent danger of serious physical injury.

In light of the foregoing, § 1915(g) prohibits Plaintiff from proceeding *in forma pauperis* in this action. Plaintiff has twenty-eight (28) days from the date of entry of this order to pay the entire civil action filing fee, which is $350.00. When Plaintiff pays his filing fee, the Court will screen his complaint as required by 28 U.S.C. § 1915A and 42 U.S.C. § 1997e(c). If Plaintiff fails to pay the filing fee within the 28-day period, his case will be dismissed without prejudice, but he will continue to be responsible for payment of the $350.00 filing fee.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1772

ANDRE LEE COLEMAN, Plaintiff-Appellant,

v.

AARON J. VROMAN, ARUS, in his Official and Individual Capacities; MARY E. FATE, RUM, in her Official and Individual Capacities, Defendants-Appellees.

January 10, 2014

ORDER

Andre L. Coleman, a pro se Michigan prisoner, moves the court to grant him permission to proceed in forma pauperis in his appeal from a district court order dismissing his civil complaint.

Seeking monetary and equitable relief, Coleman, an inmate at the Ionia Correctional Facility, sued Resident Unit Manager Mary Fate and Assistant Resident Unit Manager Aaron Vroman, claiming that the defendants violated his rights by: (1) failing to properly process his legal mail; and (2) retaliating against him for complaining about prison staff by having him transferred to a different facility.

The district court initially granted Coleman's request to proceed in forma pauperis. However, the defendants filed a motion to revoke Coleman's pauper status because he has at least three prior cases that had been dismissed as frivolous or for failure to state a claim. A magistrate judge filed a report recommending that the district court grant the defendants' motion and revoke Coleman's pauper status. *See Coleman v. Sweeney, et al.*, 2:09-cv-178 (W.D. Mich. Oct. 8, 2009); *Coleman v. Kinnunen*, No. 2:05-cv-256 (W.D. Mich. Mar. 17, 2008); *Coleman v. Lentin, et al.*, 2:92-cv-120 (W.D. Mich. Aug. 31, 1992). Coleman objected, arguing that the prior dismissals did not qualify as strikes. He also argued that, pursuant to *Thompson v. Drug Enforcement Admin.*, 492 F.3d 428, 432-33, 440 (D.C. Cir. 2007), the dismissal of *Coleman v. Sweeney* does not constitute a "strike" because his appeal from the dismissal of that case was still pending when the district court denied his application for in forma pauperis status. The district court rejected Coleman's objections and revoked his pauper status. The district court also instructed Coleman to pay his filing fee within thirty days of its order, and warned him that failure to comply would result in the dismissal of his complaint. Subsequently, the district court dismissed Coleman's complaint, without prejudice, because he had not paid the filing fee. The district court denied Coleman permission to proceed in forma pauperis on appeal.

An appeal in this case would be frivolous as it lacks an arguable basis in law. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Callihan v. Schneider*, 178 F.3d 800, 804 (6th Cir. 1999).

The district court properly denied Coleman's application to proceed in forma pauperis pursuant to 28 U.S.C.

§ 1915(g). The "three strikes" provision of § 1915(g) provides that:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g).

The district court determined that Coleman had previously filed three complaints that had been dismissed as frivolous. Although Coleman argued that the dismissal of *Coleman v. Sweeney* does not constitute a "strike" because his appeal from the dismissal of that case was still pending when the district court denied his application for in forma pauperis status, this court has recently held that a dismissal of a case for failure to state a claim qualifies as a "strike" even if the appeal from the dismissal is pending at the time a prisoner files a new complaint. *Coleman v. Tollefson*, 733 F.3d 175, 177 (6th Cir. 2013). A review of the other dismissals reflect that *Coleman v. Kinnunen* was dismissed for failure to state a claim and that *Coleman v. Lentin et al.* was dismissed as frivolous. In addition, Coleman did not allege any facts to establish that he is in imminent danger of serious physical injury, and thus he does not fit within the exception to the statutory mandate that prohibits him from proceeding in forma pauperis in light of his three prior frivolity dismis-

sals. Therefore, the district court properly dismissed Coleman's complaint for failure to pay the filing fee in the absence of pauper status.

Accordingly, the motion for in forma pauperis status is hereby denied pursuant to 28 U.S.C. § 1915(a)(3). Coleman is directed to pay the appellate filing fee of $455 in full with the district court within 30 days of the filing date of this order, or else this appeal will be dismissed for lack of prosecution.

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt
Clerk

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1772

ANDRE LEE COLEMAN, named as "Andre Lee Coleman-Bey," Plaintiff-Appellant

v.

AARON J. VROMAN, ARUS, in his Official and Individual Capacities; MARY E. FATE, RUM, in her Official and Individual Capacities, Defendants-Appellees.

February 24, 2014

ORDER

Appellant having previously been advised that failure to satisfy certain specified obligations would result in dismissal of the case for want of prosecution and it appearing that the appellant has failed to satisfy the following obligation(s):

The proper fee was not paid by February 10, 2014.

It is therefore **ORDERED** that this cause be, and it hereby is, **dismissed** for want of prosecution.

ENTERED PURSUANT TO RULE 45(a), RULES OF THE SIXTH CIRCUIT

Deborah S. Hunt, Clerk

Issued: February 24, 2014 s/Deborah S. Hunt

APPENDIX M

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 10-cv-354

ANDRE LEE COLEMAN, #173324, Plaintiff,

v.

AARON J. VROMAN, ET AL., Defendants.

May 27, 2011

OPINION AND ORDER

NEFF, District Judge.

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff was granted leave to proceed as a pauper on April 27, 2010 (Dkt 3). On January 10, 2011, Defendant Vroman filed a motion requesting that the Court revoke Plaintiff's pauper status (Dkt 31). The Magistrate Judge issued a Report and Recommendation (R & R), recommending that this Court grant Defendant's motion (Dkt 47). The matter is presently before the Court on Plaintiff's objections to the Report and Rec-

ommendation (Dkts 48, 50).[1] In accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order.

Plaintiff objects that the Magistrate Judge incorrectly determined that several of Plaintiff's previous cases qualify for purposes of the "three strikes" rule under 28 U.S.C. § 1915(g). Plaintiff's objections are without merit. Plaintiff has three cases that so qualify. Contrary to Plaintiff's argument, in *Coleman v. Lentin*, 2:92-cv-120 (W.D. Mich., Aug. 31, 1992), Plaintiff's case was dismissed as frivolous and without merit pursuant to the R & R (2:92-cv-120, Dkt 3), which the district court adopted as its opinion (Pl's. Obj., Dkt 50, Ex. 1). Further, to the extent Plaintiff argues that § 1915(g) applies only after an appeal has been either waived or resolved, the pending appeal in *Coleman v. Sweeney*, 2:09-cv-178 (W.D. Mich., Oct. 8, 2009), has been resolved: Plaintiff's case was dismissed for failure to state a claim, and the Judgment was affirmed on appeal on March 29, 2011. In *Coleman v. Kinnunen*, 2:05-cv-256 (W.D. Mich., Mar. 17, 2008), Plaintiff's case was dismissed for failure to state a claim, not by some other procedural mechanism, and was affirmed on appeal (2:05-cv-256, Dkts 57-58, Dkt 63 at 2). *See Pointer v. Wilkinson*, 502 F.3d 369, 377 (6th Cir. 2007). Plaintiff's objections are denied.

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[1] Plaintiff filed an Objection (Dkt 48) to Defendant's reply brief and subsequently filed another Objection (Dkt 50) objecting to the R & R. The Court does not address the propriety of these distinct filings since both Objections merely address the overall issue presented, and both Objections are without merit.

Accordingly, this Court adopts the Magistrate Judge's Report and Recommendation as the Opinion of this Court.

Therefore:

IT IS HEREBY ORDERED that the Objections (Dkts 48, 50) are DENIED and the Report and Recommendation (Dkt 47) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that Defendant's Motion to Revoke Plaintiff's *In Forma Pauperis* Status (Dkt 31) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's *In Forma Pauperis* Status is REVOKED.

IT IS FURTHER ORDERED that Plaintiff is required to submit the entire $350.00 filing fee[2] within thirty (30) days of the date of entry of this Order; Plaintiff's failure to do so will result in dismissal of this action (any such dismissal will not, however, negate Plaintiff's obligation to pay the filing fee in full).

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[2] The Court's records indicate that Plaintiff has paid only the initial filing fee of eighty-three cents ($0.83). Thus, Plaintiff still owes three hundred forty-nine dollars and seventeen cents ($349.17) of the filing fee.

OPPOSITION BRIEF

No. 13-1333

In the Supreme Court of the United States

ANDRE LEE COLEMAN, AKA ANDRE LEE COLEMAN-BEY,
PETITIONER

v.

TODD TOLLEFSON, ET AL.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Prison Litigation Reform Act created a three-strikes rule to limit the number of times a prisoner may qualify for *in forma pauperis* status. The question presented is:

1. Whether 28 U.S.C. § 1915(g) bars a prisoner from filing a fourth new action when a district court's dismissal of a separate action that would count as one of the prisoner's three strikes is pending on appeal.

PARTIES TO THE PROCEEDING

Petitioner is Andre Lee Coleman-Bey, a state prisoner confined in the Michigan Department of Corrections (MDOC). Respondents are Todd Tollefson, William Luetzow, Joseph Bouchard, Mary Aho, Kimberley Mieni, and James Armstrong—all of whom are, or were, MDOC employees. Respondents did not participate in the district-court proceedings because the complaint was dismissed *sua sponte* under 28 U.S.C. § 1915(g), which is the "three strikes" rule.

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OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 733 F.3d 175. The denial of the petition for rehearing *en banc* is an unpublished order. The opinion of the U.S. District Court for the Western District of Michigan is unreported, but available at 2011 WL 573590.

JURISDICTION

The district court had jurisdiction over Coleman-Bey's claims under 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. The court of appeals filed its opinion on October 23, 2013, and denied rehearing *en banc* on January 17, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1915(g) states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

INTRODUCTION

The petition presents an issue that does not often occur: is a prisoner barred from filing a fourth action under *in forma pauperis* status when one or more of his three prior strikes under 28 U.S.C. § 1915(g) is being appealed? This question arises so infrequently that it took over 17 years after the Prison Litigation Reform Act was enacted before the Sixth Circuit decided the issue in a published decision. This petition does not present an issue of sufficient importance to warrant this Court's review.

Further, the bulk of the decisions the petition relies on address a different question: whether a prisoner is barred from appealing his third strike. But this concern that an erroneous third strike might be insulated from review is not present here. To the contrary, the opinion below expressly recognized that a "third strike may be appealed even though it would count as a strike with regard to a fourth or successive suit." Pet. App. 6a. So unlike the prisoners in the leading cases he cites, Coleman-Bey is *not* being denied the opportunity to appeal a strike; he is only being precluded from bringing a new, separate action until he obtains a reversal of a dismissal in one of his prior cases.

Review is also unnecessary because the Sixth Circuit reached the correct conclusion under the plain language of 28 U.S.C. § 1915(g). The statute bars Coleman-Bey's fourth action because he "has, on 3 or more prior occasions, brought an action that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim." *Id.*

STATEMENT OF THE CASE

This is a 42 U.S.C. § 1983 action originally brought *pro se* by Andre Lee Coleman-Bey, a prisoner incarcerated in the Michigan Department of Corrections. Coleman-Bey, a frequent litigator, filed his complaint on December 3, 2010, based on events that relate to the prison grievance process and that took place from November of 2004 through November of 2007.

When Coleman-Bey filed the complaint in this action, three of his previous cases had already been dismissed for failure to state a claim, which resulted in three "strikes" under 28 U.S.C. § 1915(g). The three cases that counted as strikes are *Coleman* v. *Lentin*, *Coleman* v. *Kinnunen*, and *Coleman* v. *Sweeney*. Pet. App. 3a–4a. Coleman-Bey's petition challenges the validity of the third strike (*Sweeney*), which was pending on appeal at the time Plaintiff filed his complaint in the instant case and when the district court denied *in forma pauperis* status. Pet. App. 4a. The court of appeals ultimately affirmed the dismissal in *Sweeney* on March 29, 2011—just six weeks after the district court denied *in forma pauperis* status in the instant case.

Coleman-Bey appealed the denial of *in forma pauperis* status. In a 2-1 decision, the court of appeals affirmed the district court's decision to deny *in forma pauperis* status based on Coleman-Bey having three strikes. The majority recognized that "§ 1915(g) 'does not say that the dismissal must be final in all of the courts of the United States.' " Pet. App. 4a. He sought rehearing *en banc*, which was denied.

Coleman-Bey does not argue that any of the three earlier cases did not qualify as strikes, nor does he argue that he qualifies for the "imminent danger" exception to the three-strikes rule. The sole issue is *when* the third strike (*Sweeney*) should have counted—when the district court dismissed the case or when the court of appeals affirmed the dismissal.

Furthermore, Coleman-Bey seeks to consolidate this case with three other cases that he filed: *Coleman-Bey* v. *Bowerman*, *Coleman-Bey* v. *Dykehouse*, and *Coleman-Bey* v. *Vroman*. Pet. 9. The court of appeals denied Coleman-Bey *in forma pauperis* status in all three of these cases. The four cases have different procedural postures and do not all fit neatly into the question that he wants this Court to review.

As discussed below, the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. The issue presented by Coleman-Bey affects only a small and narrow category of cases.

The underlying fundamental right involved in this case is access to the courts. Coleman-Bey is correct that "[t]his Court has long stressed the important role that the federal *in forma pauperis* statute plays in guaranteeing meaningful access to the courts for indigent litigants." Pet. 18 (citing *Denton* v. *Hernandez*, 504 U.S. 25, 31 (1992)). But that right is not without limits.

The Prison Litigation Reform Act was enacted "in 1996 in the wake of a sharp rise in prisoner litigation in the federal courts" and "contains a variety of provisions designed to bring this litigation under control." *Woodford* v. *Ngo*, 548 U.S. 81, 84 (2006). The PLRA limited the *in forma pauperis* statute: "Congress imposed on prisoners, among other hurdles, the three-strikes limitation to proceeding *in forma pauperis*." *Blakely* v. *Wards*, 738 F.3d 607, 612–13 (4th Cir. 2013) (en banc).

And even before Congress enacted the PLRA, proceeding under the *in forma pauperis* statute was not an unlimited right. Focusing on the discretionary nature of the word "may" in the statute, this Court denied *in forma pauperis* status to a litigant who had abused the privilege. *In re McDonald*, 489 U.S. 180, 183 (1989). This Court observed that "paupers filing *pro se* petitions are not subject to the financial considerations—filing fees and attorney's fees—that deter other litigants from filing frivolous petitions." *Id.* at 184. Because of these incentive problems, "[b]efore the PLRA, courts routinely revoked a prisoner's ability to proceed i.f.p. after numerous dismissals." *Adepegba* v. *Hammons*, 103 F.3d 383, 387 (5th Cir. 1996). Thus, in enacting the three-strikes provision, Congress imposed specific, mandatory limitations to deter frivolous filings by creating more consistency in how courts applied the *in forma pauperis* statute.

Coleman-Bey does not argue that there cannot be limitations imposed on proceeding *in forma pauperis*, nor does he challenge the constitutionality of the three-strikes rule. Rather, the facts of his case

present a narrow issue—*i.e.*, whether a third strike in a separate case bars the filing of a new action immediately when the district court dismisses the action or whether the third strike does not bar a new action until the litigant has exhausted or waived his appellate rights for the prior strikes.

But a decision on the issue presented will be limited only to a narrow and highly specific category of cases: a case where (1) a prisoner has recently received a third strike in the district court, (2) appeals that decision to the court of appeals, and then (3) files a new action before the appeal of the third strike is final. Even though the Prison Litigation Reform Act has been in effect since April 1996, the dissenting court of appeals judge in this case acknowledged that the "appeal presents an issue that the Sixth Circuit has not addressed previously in a published opinion." Pet. App. 7a. That is because the issue does not arise frequently. Indeed, it is not even present in the majority of the seven cases the petition relies on as presenting a circuit split, because in most of those cases the third step (bringing a new action while a prior strike is on appeal) did not occur. Instead, if they involved the timing of counting a strike at all, they involved a different factual scenario, namely, an appeal of the third strike itself.

The issue presented is not as frequent as Coleman-Bey suggests, which may be why he also describes his case as "a surprisingly *rare* opportunity for the Court to resolve the question presented." Pet. 21. (emphasis added). And the potential harm that motivated courts addressing the other factual

scenario (barring an appeal of a third strike, as opposed to barring the filing of a fourth action) is not present here, because all of his strikes arose in different cases. See *Adepegba*, 103 F.3d at 388 ("A hyper-literal reading of the statute might also bar a prisoner's appeal of an erroneous third strike, since the appeal would follow three prior dismissals.").

In the Sixth Circuit, however, this concern is unfounded. The court of appeals explicitly held that "[t]he concern about this anomalous result is not warranted, however, because the third strike may be appealed even though it would count as a strike with regard to a fourth or successive suit." Pet. App. 6a. The court of appeals reached this conclusion by focusing on the phrase "3 or more *prior occasions*," concluding that "[a] third strike that is on appeal is not a *prior* occasion for the purposes of that appeal, because it is the *same* occasion." *Id.* (emphasis in original).

Coleman-Bey does not dispute that the Sixth Circuit's decision in *Tollefson* avoided the potential problem contemplated in *Adepegba* and other earlier cases. Rather, his main concern is that an *erroneous* third strike—not yet corrected on appeal—will bar a prisoner litigant from filing a new action. Pet. 12. In this particular case, though, we *know* that this concern was unfounded. That is because the court of appeals affirmed Coleman-Bey's third strike in *Sweeney* on March 29, 2011. So, this case does not present a situation where an erroneous third strike prevented a litigant from bringing a new action. Furthermore, even if a district court dismisses a case and generates a third strike, the error is temporary,

not permanent. A prisoner litigant would simply have to wait until the erroneous third strike is reversed before bringing a new action.

If anything, the Sixth Circuit's rule avoids the outcome that a third strike in the district court may trigger a "litigation spree," whereby a prisoner litigant attempts to bring as many cases as possible under the *in forma pauperis* statute before the third strike is affirmed by the court of appeals. This outcome is more likely than the possibility of an erroneous third strike. See, e.g., *In re McDonald*, 489 U.S. at 181 (discussing a prisoner who had filed eight petitions for a writ of certiorari in a single term). Overall, reversal rates in prisoner civil rights cases are quite low. Although the reversal rate for denials of i.f.p. status is not clear, in general the reversal rate for all courts of appeals is 2.7% for U.S. prisoner petitions and 3.7% for private prisoner petitions. See Table B-5 Appeals Terminated on the Merits, by Circuit (http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/B05Mar13.pdf).

The petitioner has failed to identify a case where he—or any other prisoner—was prevented from bringing a meritorious action under the *in forma pauperis* statute because the new action could not be brought before the erroneous strike was reversed by the court of appeals. In other words, he is proposing a solution in search of a problem. Consequently, the petition for a writ of certiorari should be denied.

II. The circuit split is much less developed than the petition suggests.

On the broad question of when a dismissal counts as a strike, it is true that the circuits do not completely align. But the disagreement is not over a clearly defined question, and it is largely about a different factual scenario from the one presented here.

Under the majority rule, a dismissal does not count as a strike until a litigant's appellate rights have been exhausted or waived. But the Sixth Circuit panel majority observed that "[m]any of these cases rely on the unfounded concern that treating an appealed dismissal as a strike would preclude that very appeal." Pet. App. 5a. Thus, the actual question decided in earlier cases was whether a district court dismissal that resulted in a third strike would preclude a litigant from appealing that very decision—as opposed to bringing a fourth, separate action. On that question—whether a litigant can appeal the third strike—the Sixth Circuit's decision does *not* create a circuit split. While the petition emphasizes this distinction as if it were a virtue, Pet. 20 (stating that this case is "free of any complication that might arise where the dismissal is potentially being counted as a 'strike' *on appeal in the same case*"), the distinction shows that the facts in Coleman-Bey's primary cases addressed a different factual scenario.

Earlier cases that addressed the three-strikes rule did not focus on the specific question here—*i.e.*, whether a fourth or subsequent action would be barred after the district court's dismissal, or not

until after the litigant's appellate rights had been exhausted or waived. Instead, they focused on whether counting a district court's dismissal as a third strike would preclude appealing that dismissal.

A. The leading case on which the petition relies did not decide when to count a strike.

In *Adepegba*—one of the first cases to tackle the then-newly enacted PLRA—the Fifth Circuit faced several issues. The two main threshold issues were whether § 1915(g) applied to cases pending on the effective date of the statute and whether to count as strikes dismissals that accrued before the PLRA went into effect. *Adepegba*, 103 F.3d at 385–87. The opinion also answered several other questions, including that "both the frivolous appeal and a lower court's dismissal as frivolous count [as a strike]," but that the "reversal of a dismissal as frivolous nullifies the strike." *Id.* at 387–88.

But the court of appeals in *Adepegba* did not directly face the question presented in the instant case because *Adepegba* involved three strikes for which the appeals had already occurred: the first strike was a district-court dismissal that had already been affirmed, the second strike was another district-court dismissal that had already been affirmed, and the third strike was an appeal in another case that the Fifth Circuit had dismissed as a frivolous appeal. *Id.* at 387–88. In fact, the conclusion in *Adepegba* was to dismiss that case, "as well as any other appeal not involving physical injury, pending in this circuit on the date of this opinion." *Id.* at 388.

Thus, to the extent that the *Adepegba* court commented on when a strike should count for purposes of bringing a new action, those comments were dicta, not necessary for the outcome of the case, and, worse, dicta that was addressing a different concern. In short, the scenario presented here was not resolved by *Adepegba*.

B. The three cases cited in the petition that did address timing involved a different factual scenario.

As to the First, Tenth, and D.C. Circuits decisions the petition cites, those cases involved the concern that counting a district-court dismissal as a strike would preclude appealing that dismissal. That concern is not present on Coleman-Bey's facts.

For example, the D.C. Circuit's decision on this issue, *Thompson* v. *Drug Enforcement Admin.*, 492 F.3d 428 (D.C. Cir., 2007), focused on the concern that if dismissals counted before the appeals process had come to a close, that rule would "effectively eliminate [its] appellate function." *Id.* at 432. Accordingly, for the first defendant (Michael Thompson), the D.C. Circuit refused to count a dismissal as a second strike because the dismissal was being appealed in that very case. *Id.* at 439 (discussing the dismissal "in this case"). The court thus concluded he had only one strike, not counting other dismissals for reasons unrelated to timing. *Id.* at 431, 437–38 (rejecting other potential strikes because an affirmance does not count as an additional strike, because it could not determine the grounds for dismissals in two prior cases, and because another dismissal was for lack of subject-

matter jurisdiction, not for failure to state a claim). And as to the second defendant (Charles Thompson), the court did not focus on timing; rather, it did not reach a third strike because the prior dismissals were on grounds not covered by § 1915(g). *Id.* at 431–32, 439 (i.e., statute of limitation, lack of standing, and lack of jurisdiction).

In fact, the timing issue was not even contested in *Thompson*: "Both sides also agree that the district court dismissals in the two cases on appeal here could not possibly count as strikes until the respective appeals are exhausted." 492 F.3d at 432. In any event, *Thompson* would have come out the same in the Sixth Circuit, given that the Sixth Circuit expressly stated that a "third strike may be appealed even though it would count as a strike with regard to a fourth or successive suit." Pet. App. 6a.

Another leading case involving when to count a strike, *Jennings* v. *Natrona County Detention Center Medical Facility*, 175 F.3d 775, 778 (10th Cir. 1999), also did not address a factual scenario like Coleman-Bey's. In *Jennings*, the Tenth Circuit faced the question whether the three-strikes rule could prohibit an appeal of that same case. It involved two consolidated appeals, where the district court had dismissed both of his cases and then, adding those two strikes to a prior dismissal, denied him leave to file his appeal *in forma pauperis*. The Tenth Circuit reversed, concluding he could appeal those cases *in forma pauperis*, *id.* at 777, but then dismissed the appeals as frivolous and barred him from further *in forma pauperis* filings, *id.* at 781. As with *Thompson*,

the factual scenario in *Jennings* would have come out the same in the Sixth Circuit. Pet. App. 6a.

And as for the First Circuit, it made only a passing reference to the rule in a footnote in an unpublished decision, relying on *Adepegba* and *Jennings* without discussing the specific strikes. *Michaud* v. *City of Rochester*, 248 F.3d 1127 n.1 (1st Cir. 2000).

C. The remaining circuits simply relied on prior cases that had addressed a different issue and did not separately analyze this factual scenario.

Very few cases have directly addressed the issue presented here—*i.e.*, whether a dismissal that is pending on appeal counts as a strike to bar a fourth or successive lawsuit.

The Eighth Circuit confronted this factual scenario in a *per curiam* opinion. *Campbell* v. *Davenport Police Dept.*, 471 F.3d 952 (8th Cir. 2006). But the court simply applied the rule from *Adepegba* and *Jennings* without any critical analysis; it did not address whether the rule that those cases developed out of a concern that a third strike could not be appealed also made sense in the separate context of whether a fourth action could be brought.

The Third Circuit, in a decision that addressed numerous issues, decided to "follow the rule of those circuits that hold that a dismissal does not count as a strike until it has been affirmed on appeal, or the opportunity to appeal has otherwise concluded." *Ball* v. *Famiglio*, 726 F.3d 448, 465 (3rd Cir. 2013). The

Third Circuit simply followed *Adepegba*, *Thompson*, and *Jennings*, none of which involved an attempt to bring a fourth action, so it too rested on the premise underlying those cases—that a third strike might not be appealable. And as with *Adepegba*, the question in the instant case was not presented in *Ball*. *Ball* was not an appeal from the denial of *in forma pauperis* status. Rather, the litigant in *Ball* "appeal[ed] the denial of her motion for a preliminary injunction and the grant of summary judgment to the defendants ." *Id.* at 451. Furthermore, the *Ball* court noted that the majority rule itself is not clear. "That rule leaves open the question of whether a prisoner accrues a strike as soon as a dismissal by the district court is affirmed by a court of appeals, or only when the Supreme Court has denied or dismissed a petition for writ of certiorari or the time for filing one has passed." *Id.* at 465 n.22. In other words, the majority rule is not yet clearly defined.

Finally, in a divided opinion, the Ninth Circuit decided the issue in *Silva* v. *Di Vittorio*, 658 F.3d 1090 (9th Cir. 2011). But the court in *Silva* reached the issue only because the defendants argued that the court should not reach the merits of the appeal because the plaintiff's appeal was barred by the "three strikes" rule. And, following the pattern of *Campbell* and *Ball*, the Ninth Circuit focused on the concern that a third strike could not itself be appealed and the concern that such a rule would " 'effectively eliminate [its] appellate function.' " *Id.* at 1098, 1099 (quoting *Thompson*, 429 F.3d at 432. Further, the case was not an appeal from the denial of *in forma pauperis* status, like the instant case. And as noted by the Third Circuit in *Ball*, it is not

yet clear how far into the appellate process a litigant must go until the dismissal may be counted as a strike.

In short, the circuit split is not as straightforward and clean as Coleman-Bey implies. The issue requires further development in the lower courts, so that courts can apply the actual language of § 1915(g) to the fact pattern presented here, rather than just assuming the outcome.

Furthermore, the four cases sought to be consolidated in the petition do not all fit neatly into its question presented. Again, even if Coleman-Bey's proposed rule is followed, he accrued his third strike when the court of appeals affirmed *Sweeney* on March 29, 2011. In *Bowerman* and *Vroman*, the district court initially granted him *in forma pauperis* status. In both cases, though, the district court then revoked *in forma pauperis* status after *Sweeny* was affirmed and the defendants filed a motion. Pet. 32a, 52a. Including these cases therefore muddies the issue further. These cases present the additional question whether *in forma pauperis* status can be revoked after the third strike is affirmed on appeal. And of course, it is unclear whether "appellate review" means review by a court of appeals or whether it means that a strike is not counted until this Court has denied or dismissed a petition for writ of certiorari or the time for filing one has passed.

In sum, the question is ambiguous, and the issue is underdeveloped, because most circuits have been addressing a different fact pattern. This is not the proper case for resolving the general issue of when a dismissal should be counted as a strike.

III. The decision below was correct.

The petition also does not warrant review because the Sixth Circuit's decision was consistent with the plain language of the statute. Coleman-Bey "has, on 3 or more prior occasions, brought an action that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim." § 1915(g).

Coleman-Bey no longer disputes that the dismissals fall within the three grounds specified in the statute. Instead, he contests whether the prior dismissals count as "dismissed" when "still pending on review or before the time for seeking appellate review has passed," Pet. 3, in effect inserting into the statute a requirement that a dismissal be final on appeal. See Pet. App. 9a (Daughtrey, J., dissenting) (concluding that dismissals count only when they have become final).

But the plain language of § 1915(g) imposes no such finality requirement. To the contrary, the statutory text clearly differentiates between dismissal of an action and dismissal of an appeal, and it requires counting each as strikes. 28 U.S.C. § 1915(g) (counting "an action *or* appeal that was dismissed") (emphasis added). Coleman-Bey's argument that prior actions count as strikes only if they culminated in an appeal ignores the statutory language distinguishing between trial-court dismissals and appellate dismissals. Under a plain reading of the statute, a strike may be accrued when "an action was dismissed," § 1915(g), not after appellate rights have been waived or exhausted. See *Chavis* v. *Chappius*, 618 F.3d 162, 167 (2d Cir. 2010)

(discussing the fact that "§ 1915(g)'s phrase 'action or appeal' disjunctively juxtaposes 'action' and 'appeal,'" and recognizing that the "most natural" reading is that they "connot[e] two separate parts of one larger lawsuit"). Reading a finality requirement into § 1915(g) would eliminate this distinction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

No. 13-1333

In the Supreme Court of the United States

ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

TODD TOLLEFSON, ET AL.

ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

BERTINA BOWERMAN, ET AL.

ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

STEVEN DYKEHOUSE, ET AL.

ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

AARON J. VROMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In their brief in opposition, respondents do not dispute two propositions central to the determination of whether to grant review. First, respondents do not dispute—and indeed concede—that a circuit conflict exists on the question presented: whether, under the "three strikes" provision of the Prison Litigation Reform Act (PLRA), a district court's dismissal of a lawsuit counts as

a "strike" while it is still pending on appeal or before the time for seeking appellate review has passed. Second, respondents do not dispute—and again concede—that the question presented implicates prisoners' fundamental right of access to the courts and is thus one of substantial legal and practical importance.

Instead, when all of the rhetorical frippery is stripped away, respondents make only one affirmative argument as to why certiorari should be denied: they assert that further percolation is warranted because the cases in the circuit conflict involve two different factual scenarios. But respondents' assertion is simply irrelevant, because all of the cases in the circuit conflict present the same legal question. And there are compelling reasons why the Court should resolve that question here, rather than allowing the mature conflict in the courts of appeals to persist while waiting for another case that may never reach this level. Because petitioner's cases readily satisfy the criteria for further review, the petition for certiorari should be granted.

1. Respondents concede that a circuit conflict exists on the question of "when a dismissal counts as a strike" for purposes of the PLRA's "three strikes" provision—whether immediately or only after the completion of appellate review. Br. in Opp. 9. That concession is wise, because numerous courts of appeals, including the Sixth Circuit in *Tollefson*, have acknowledged the existence of a conflict on the question. See, *e.g.*, Pet. App. 4a-5a; *id.* at 8a-9a (Daughtrey, J., dissenting); *Henslee* v. *Keller*, 681 F.3d 538, 541 (4th Cir. 2012); *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1099 (9th Cir. 2011); *Thompson* v. *DEA*, 492 F.3d 428, 432-433 (D.C. Cir. 2007); *Robinson* v. *Powell*, 297 F.3d 540, 541 (7th Cir. 2002).

Despite the widespread recognition of the circuit conflict—and the fact that all twelve of the regional circuits

have now spoken to the issue in some fashion, see Pet. 11-18—respondents contend that the conflict is "much less developed" than meets the eye. Br. in Opp. 9. In respondents' view, that is because the cases in the conflict involve two different factual scenarios: (1) cases, such as these, in which a third "strike" in an unrelated case may bar the filing of a new action *in forma pauperis*, and (2) cases in which a prisoner may be barred from *appealing* his third "strike" *in forma pauperis*. See *id.* at 2. At the risk of stating the obvious, however, the mere fact that the same *legal* question arises in different *factual* contexts is hardly a basis for denying review. And as we will now explain, respondents' factual distinction has played no role in courts' disposition of the question presented. If anything, the distinction underscores the suitability of these cases for resolution of the conflict on that question.

a. The question presented here—whether a district court's dismissal of a lawsuit counts as a "strike" while it is still pending on appeal or before the time for seeking appellate review has passed—arises in both of the factual scenarios respondents identify. Regardless of whether the purported third "strike" occurs in an unrelated case or in the same case, the question remains whether a dismissal must be final on appeal in order to count as a "strike." That is the question on which the courts of appeals are deeply and irreconcilably divided. See Pet. 11-18.

The best evidence of the irrelevance of respondents' factual distinction between decisions in the conflict can be found in the decisions themselves. Courts of appeals have addressed the question presented, and decided whether a dismissal must be final to count as a "strike," without limiting their holdings to the particular factual scenario before them. See Pet. App. 4a-5a; *Ball* v. *Fa-*

miglio, 726 F.3d 448, 464-466 (3d Cir. 2013), cert. denied, 134 S. Ct. 1547 (2014); *Silva*, 658 F.3d at 1098-1101; *Thompson*, 492 F.3d at 432-433, 439; *Campbell* v. *Davenport Police Department*, 471 F.3d 952, 952-953 (8th Cir. 2006); *Robinson*, 297 F.3d at 541; *Jennings* v. *Natrona County Detention Center Medical Facility*, 175 F.3d 775, 779-780 (10th Cir. 1999); *Adepegba* v. *Hammons*, 103 F.3d 383, 387-388 (5th Cir. 1996); *Michaud* v. *City of Rochester*, No. 00-1263, 2000 WL 1886289, at *2 n.1 (1st Cir. Dec. 27, 2000).

The Fifth Circuit's decision in *Adepegba* is representative. There, the Fifth Circuit reasoned that a dismissal must be final before it counts as a "strike" because "[a]ny other reading of the statute poses a risk of inadvertently punishing nonculpable conduct." 103 F.3d at 387. As the Fifth Circuit explained, the same risk is present in both of respondents' factual scenarios: under a contrary rule, "an indigent prisoner's fourth claim could expire while his first three dismissals were being reversed on appeal" and "a prisoner's appeal of an erroneous third strike" could also be barred. *Id.* at 387-388. And since the Fifth Circuit's decision in *Adepegba*, as respondents acknowledge (Br. in Opp. 13-14), the courts of appeals have drawn on each other's reasoning without regard to whether a particular court announced its rule in one factual scenario or the other. See, *e.g.*, Pet. App. 4a (citing *Robinson*); *Silva*, 658 F.3d at 1099 (citing *Thompson*, *Campbell*, *Jennings*, and *Adepegba*); *Thompson*, 492 F.3d at 432-433 (citing *Campbell*, *Jennings*, and *Adepegba*).

b. Even if respondents were correct to attach any significance to the distinction between the two factual scenarios in the cases giving rise to the circuit conflict, the factual scenario presented here—where the purported "strike" at issue occurred in an unrelated case—is ac-

tually the more common one. Respondents are simply wrong to assert otherwise. See Br. in Opp. 2, 6, 9, 13, 15.

Of the nine courts of appeals to have squarely resolved the question presented, four did so in cases where the purported "strike" at issue occurred in an unrelated case. See Pet. App. 4a; *Ball*, 726 F.3d at 465-466; *Silva*, 658 F.3d at 1100; *Campbell*, 471 F.3d at 952. A fifth did so in a case presenting *both* factual scenarios. See *Jennings*, 175 F.3d at 779; but see Br. in Opp. 12-13 (erroneously stating that *Jennings* involved only an appeal of a third "strike"). And a sixth did so in a case where it is unclear which factual scenario was at issue. See *Michaud*, 2000 WL 1886289, at *2 n.1; but see Br. in Opp. 13 (simply assuming that *Michaud* involved an appeal of a third "strike").

Only three courts of appeals resolved the question presented in cases that involved only an appeal of a third "strike." See *Thompson*, 492 F.3d at 432; *Robinson*, 297 F.3d at 541; *Adepegba*, 103 F.3d at 387. Even as to those courts, one went on to address both factual scenarios. See *Adepegba*, 103 F.3d at 387-388; p. 4, *supra*. And courts in each of those circuits have applied the same rule to cases where the purported third "strike" occurred in an unrelated case. See *Davis* v. *Kyle*, 318 Fed. Appx. 269, 269-270 (5th Cir. 2009); *Akers* v. *Watts*, 589 F. Supp. 2d 12, 15 n.5 (D.D.C. 2008); *Bond* v. *Aguinaldo*, 228 F. Supp. 2d 918, 919 & n.1 (N.D. Ill. 2002).

Respondents are incorrect, therefore, when they wishfully assert that the question presented here concerns "only a small and narrow category of cases" addressed by "[v]ery few" courts. Br. in Opp. 4, 13. Even assuming that respondents' distinction between the two factual scenarios actually matters, but see pp. 3-4, *supra*, the factual scenario underlying petitioner's cases is the more representative one in the circuit conflict. And in

fact, the courts of appeals are divided on the question presented in each scenario, with the Sixth Circuit disagreeing with four other courts of appeals to have decided the question in this scenario, and the Seventh Circuit disagreeing with three courts of appeals to have decided the question in the supposedly more common scenario. Respondents' factual distinction is therefore nothing more than an effort to pick away at the edges of a conceded circuit conflict.[1]

c. If anything, respondents' factual distinction affirmatively illustrates why these cases would be an ideal vehicle for resolution of the question presented. Where, unlike here, a dismissal is potentially being counted as a "strike" on appeal in the same case, the resolution of the question presented would not necessarily be outcome-dispositive: there would be an additional question whether treating such a dismissal as a "strike" would violate the discrete statutory requirement that the prisoner have brought the action or appeal giving rise to the "strike" on a "prior occasion[]." 28 U.S.C. 1915(g). In *Tollefson*, the Sixth Circuit raised the possibility that treating such a dismissal as a strike would violate the "prior occasion[]" requirement, see Pet. App. 6a, and at least one other court of appeals has so held, see *Henslee*,

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[1] In discussing *Silva*, *supra*, respondents imply (Br. in Opp. 14) that there is a meaningful distinction between cases involving a court of appeals' review of the district court's denial of *in forma pauperis* status, on the one hand, and a court of appeals' determination of *in forma pauperis* status to proceed with an appeal, on the other. But it is hard to see why that distinction would matter, because Section 1915(g) applies in both situations (and a court of appeals reviews de novo a district court's determination of whether a dismissal constitutes a "strike"). In any event, both situations are presented by these cases. See Pet. 5-6, 9.

681 F.3d at 543 & n.11. That additional question, however, is not presented by cases involving the factual scenario presented here: *i.e.*, cases where the purported third "strike" occurred in an unrelated case. See Pet. App. 6a. If anything, therefore, it would be preferable for the Court to resolve the question presented in this factual scenario, rather than in the more complex and less common scenario identified by respondents.[2]

At bottom, respondents' argument for further percolation boils down to a simple disagreement with the reasoning of the vast majority of courts of appeals to have considered the question presented. Compare Br. in Opp. 9 (conceding that, "[u]nder the majority rule, a dismissal does not count as a strike until a litigant's appellate rights have been exhausted or waived") with *id.* at 15

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[2] Respondents imply that, in either factual scenario, adopting petitioners' interpretation would require the Court to consider an additional question: *viz.*, "how far into the appellate process a litigant must go until the dismissal may be counted as a strike." Br. in Opp. 15. But courts adopting petitioner's interpretation have consistently held that a dismissal becomes final, and thus counts as a "strike," when the prisoner has exhausted or forfeited appellate review (including review in this Court). See, *e.g.*, *Silva*, 658 F.3d at 1100 & n.6; *Hafed* v. *Federal Bureau of Prisons*, 635 F.3d 1172, 1176 (10th Cir. 2011); *Adepegba*, 103 F.3d at 388.

In a related vein, respondents note (Br. in Opp. 15) that, as to two of the four cases that are the subject of this petition, the district court revoked *in forma pauperis* status after the dismissal that would have counted as the third "strike" was affirmed on appeal. As Judge Daughtrey explained in her dissent below, however, the salient question is whether the dismissal was final as of the date the underlying action was filed. Pet. App. 12a-13a. Should this Court grant review and adopt petitioner's interpretation, moreover, the Court could readily leave any question concerning the statute's application to those two cases for the lower courts to resolve on remand.

(arguing for "further development in the lower courts, so that courts can apply the actual language of [28 U.S.C.] 1915(g)"). But it is implausible that *seven* courts of appeals would overrule their precedent to adopt the Sixth and Seventh Circuits' interpretation and eliminate the circuit conflict—particularly because the three other regional courts of appeals have suggested that they would follow the majority rule. The deeply entrenched conflict on the question presented warrants the Court's review, and these cases afford the Court an ideal vehicle in which to resolve that conflict.

2. Respondents' remaining points require little by way of reply.

a. On the importance of the question presented, respondents concede that "[t]he underlying fundamental right involved in th[ese] case[s] is access to the courts." Br. in Opp. 4. And they acknowledge that Congress's goal in enacting this provision of the PLRA was to "creat[e] more consistency in how courts applied the *in forma pauperis* statute" to grant or deny that access. *Id.* at 5.

Respondents nevertheless contend (Br. in Opp. 6-7) that these cases do not implicate those interests, on the ground that the dismissal that would have counted as petitioner's third "strike" was eventually affirmed on appeal. But that contention completely misses the point. By erroneously counting the dismissal as a "strike," even though the appeal was still pending at the time petitioner filed his new actions, the district court "potentially bar[red] the filing of meritorious claims." Pet. App. 10a (Daughtrey, J., dissenting). Regardless of whether the dismissal that would have counted as the third "strike" was later affirmed, petitioner was entitled to proceed *in forma pauperis* on the claims in *these cases*—which were

all filed at a time when petitioner had only two valid "strikes" against him.

For much the same reason, it is wholly illogical for respondents to argue that petitioner has not demonstrated that he has been "prevented from bringing a *meritorious* action." Br. in Opp. 3 (emphasis added). By virtue of its reading of the "three strikes" provision, the Sixth Circuit has foreclosed petitioner from obtaining consideration of the claims in these cases on the merits—making it is impossible to know whether his claims, or those of other prisoners in similar situations, would ultimately be successful.

Finally as to the importance of the question presented, respondents assert that the question arises "infrequently," seemingly based on the parochial view that "it took over 17 years after the [PLRA] was enacted before the Sixth Circuit decided the issue in a published decision." Br. in Opp. 2. As petitioner has amply demonstrated, however, the question presented has arisen often in courts nationwide; indeed, this is the rare case in which all twelve of the regional circuits have now spoken to the question in some fashion. See Pet. 11-18 (citing cases). And while the question presented has arisen often in the lower courts, opportunities for this Court to resolve it have not. See Pet. 21. Respondents do not cite even a single previous petition for certiorari that has raised the question presented, nor are we aware of any. If the Court denies review in these cases, therefore, it is far from clear when, if ever, the Court would have another opportunity to address the question presented and resolve the circuit conflict.

b. Perhaps recognizing that these cases are a compelling candidate for the Court's review, respondents preview their argument on the merits. See Br. in Opp. 16-17. For present purposes, it should suffice to note

that the conflicting views of the courts of appeals concerning the interpretation of Section 1915(g) underscore the need for this Court's review. But respondents' contention that "the plain language of [Section] 1915(g) imposes no * * * finality requirement," *id.* at 16, warrants a brief response here.

As the vast majority of courts of appeals to have considered the issue have recognized, the text of Section 1915(g) is ambiguous on the question presented: it "does not expressly state whether a prior dismissal of 'an action or appeal' must be final before it can be considered a 'strike.'" *Silva*, 658 F.3d at 1098; see, *e.g.*, *Ball*, 726 F.3d at 464. Those courts have persuasively explained that the ambiguous statutory language should be interpreted to count only final dismissals as "strikes," because to do otherwise would "pose[] a risk of inadvertently punishing nonculpable conduct." *Adepegba*, 103 F.3d at 387. And the mere fact that a court of appeals' dismissal of an *appeal* may count as an additional "strike" under Section 1915(g), see Br. in Opp. 16-17, in no way indicates that Congress intended to penalize prisoners immediately for a district court's dismissal that is under appellate review and may be reversed. Indeed, the history of the statute, which reflects Congress's intention "only to penalize litigation that is truly frivolous, not to freeze out meritorious claims or ossify district court errors," strongly suggests the opposite. *Adepegba*, 103 F.3d at 388.

Ultimately, however, the debate about the merits of the Sixth Circuit's interpretation is for another day. There can be no debate that the Sixth Circuit's decision deepens a widely recognized conflict on an undeniably important and recurring question. The Court should grant the petition for certiorari and resolve the conflict on the proper interpretation of the PLRA's "three strikes" provision.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2014

AMICUS CURIAE BRIEF

No. 13-1333

In The
Supreme Court of the United States

ANDRÉ LEE COLEMAN-BEY, *Petitioner*,
v.
TODD TOLLEFSON, ET AL., *Respondents*.

ANDRÉ LEE COLEMAN-BEY, *Petitioner*,
v.
BERTINA BOWERMAN, ET AL., *Respondents*.

ANDRÉ LEE COLEMAN-BEY, *Petitioner*,
v.
STEVEN DYKEHOUSE, ET AL., *Respondents*.

ANDRÉ LEE COLEMAN-BEY, *Petitioner*,
v.
AARON J. VROMAN, ET AL., *Respondents*.

On Petition for a Writ Of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari in this case presents an important question about the proper interpretation of the so-called "three strikes" provision of the Prison Litigation Reform Act. That provision denies *in forma pauperis* ("IFP") status to those prisoners who have "on 3 or more prior occasions, while incarcerated , brought an action or appeal in a [federal] court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon

---

[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

which relief may be granted," unless they allege that they are in "imminent danger of serious physical injury." 28 U.S.C. § 1915(g). Relying on this provision, the court below held that petitioner should be denied IFP status even though one of his three "strikes" was then on appeal and thus subject to reversal. Pet. App. 1a-2a.

As the Petition demonstrates, the majority of courts to consider the question have rejected the conclusion of the court below, holding that "[a] dismissal should not count against a petitioner until he has exhausted or waived his appeals." *Adepegba v. Hammons*, 103 F.3d 383, 387 (5th Cir. 1996). These courts have recognized that counting a non-final dismissal as a "strike" against a prisoner is inconsistent with the plain language of the statute, as well as settled appellate practice in the federal courts. *See, e.g., id.* at 387-88; *see also Silva v. Di Vittorio*, 658 F.3d 1090, 1098, 1100 (9th Cir. 2011). The question at the heart of this intractable conflict is unquestionably important, as it implicates the guarantee of meaningful access to the courts for indigent litigants. This brief in support of the Petition explains that counting non-final dismissals as "strikes" raises serious constitutional questions because it significantly limits prisoners' ability to access the courts to present fundamental constitutional claims.

When the Framers drafted our enduring national charter, their design departed from the precursor Articles of Confederation in several key respects. One of the most critical was the establishment of the judiciary as an independent,

co-equal branch of government. Article III of the new Constitution vested the "judicial power" in the federal courts and broadly extended that power to nine categories of cases and controversies. In the debates about the Constitution's ratification, Anti-Federalists bitterly attacked the new federal judiciary, but the Framers recognized that constitutional limitations on government would be meaningless if the American people did not have the ability to vindicate their rights in the federal courts. Article III's grant of broad judicial powers to the federal courts ensured that "the Constitution should be carried into effect, that the laws should be executed, [and] justice equally done to all the community." 4 Debates in the Several State Conventions on the Adoption of the Constitution 160 (Jonathan Elliot ed., 1836) (Davie).

Reflecting the Framers' vision, this Court has repeatedly recognized that all people, including prisoners and the indigent, must have meaningful access to the courts to present fundamental constitutional claims. If a dismissal that can be overturned on appeal constitutes a "strike" for PLRA purposes, the statute imposes an exceptionally stringent barrier on prisoners' ability to access the courts. There is a serious question whether the PLRA, so construed, is constitutional under the Due Process and Equal Protection Clauses. These serious constitutional concerns present yet another reason—in addition to the many reasons already offered by lower courts rejecting this interpretation, *see* Pet. 11-16 (discussing the case law)—why a dismissal should

not count as a strike until it has been affirmed on appeal or the time for appellate review has lapsed.

"Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land." *Bridges v. Wixon*, 326 U.S. 135, 166 (1945). *Amicus* urges the Court to grant *certiorari*.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT, CONSISTENT WITH THE RIGHT OF ACCESS TO THE COURTS, A DISMISSAL DOES NOT COUNT AS A "STRIKE" UNDER THE PRISON LITIGATION REFORM ACT WHILE IT REMAINS SUBJECT TO REVERSAL ON APPEAL

Article III of the Constitution broadly extends the "judicial power" to nine categories of cases and controversies, including "all Cases, in Law or Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. This broad extension of judicial power reflected the Framers' belief that access to the courts was essential to protect individual liberty, prevent government abuse, and ensure compliance with the law. Consistent with this belief, this Court has repeatedly recognized that there is a constitutional right to access the courts, at least to present fundamental constitutional claims.

The so-called "three strikes" provision of the Prison Litigation Reform Act, which generally prevents a prisoner from proceeding IFP if he has "on 3 or more prior occasions, while incarcerated , brought an action or appeal in a [federal] court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted," 28 U.S.C. § 1915(g), limits prisoners' access to the courts to present fundamental constitutional claims.

The decision challenged by the Petition further limited prisoners' access to the courts by holding that a dismissal counts as a "strike" for PLRA purposes even if it is "on appeal [and thus subject to reversal] at the time" that the prisoner brings his claim. Pet. App. 4a. Thus interpreted, the "3 strikes provision" could deny a prisoner access to the courts even if *all* of his previous suits were improperly dismissed by lower courts. *See Adepegba*, 103 F.3d at 387-88 (noting that "an indigent prisoner's fourth claim could expire while his first three dismissals were being reversed on appeal"). Such a construction of the PLRA raises serious constitutional questions in light of this Court's decisions recognizing a fundamental right to access the courts.

A. The Question Presented Implicates the Constitution's Guarantee of Meaningful Access to Courts

Article III of the U.S. Constitution provides that "[t]he judicial Power of the United States[]

shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1, cl. 1. The Constitution's establishment of the judiciary as an independent, co-equal branch of government was a direct response to the infirmities of the Articles of Confederation, which had created a single branch of the federal government—"the United States, in Congress assembled," Arts. of Confed. art. III—and no independent court system. *See* Akhil Reed Amar, *Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 (1987) (noting that Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power"). As a result, the federal government could not enforce its laws, prompting Alexander Hamilton to observe that a "most palpable defect of the subsisting Confederation is a total want of a SANCTION to its laws." The Federalist No. 21, at 106, 107 (Hamilton); *see id.* No. 22, at 118 (Hamilton) (explaining that "[l]aws are a dead letter without courts to expound and define their true meaning and operation").

When the Framers gathered in Philadelphia to draft the new national charter, they recognized that "there ought always to be a constitutional method of giving efficacy to constitutional provisions." *Id.* No. 80, at 443-44 (Hamilton). They debated at length what that method ought to be and ultimately concluded that federal courts should be given the power to enforce the Constitution's guarantees and ensure the supremacy of federal law in adjudicating cases that came before them. *See generally* James S. Liebman & William F.

Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required by Article III Courts*, 98 Colum. L. Rev. 696, 705-73 (1998); Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1346-55 (2001).[2]

To ensure that the federal courts would be up to this task, the Framers provided for an expansive federal judicial power vested in an independent judiciary. *See generally* U.S. Const. art. III (establishing independent judiciary whose members "shall hold their Offices during good Behavior"). Indeed, after the other possible methods of ensuring state compliance with federal law were rejected, the Convention substantially expanded the federal judicial power. First, the Convention approved the power of Congress to appoint lower federal courts, recognizing that "[i]nferior tribunals are essential to render the authority of the Natl. Legislature effectual." 2 The Records of the Federal Convention of 1787 at 46 (Max Farrand ed., 1966). The Convention also expanded the jurisdiction of the federal courts, making explicit in the text that the "jurisdiction of the national Judiciary shall extend to all cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony." *Id.* It subsequently further expanded their jurisdiction,

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[2] The Framers also considered, but rejected, a federal negative on state laws to be exercised by Congress and the use of executive power to coerce states' compliance with federal law. *See* Liebman & Ryan, at 705-73.

giving them the power to hear cases arising under "this Constitution" as well as federal laws. *Id.* at 430.

In the debates about the Constitution's ratification, Federalists and Anti-Federalists alike agreed that Article III conferred broad, substantial powers on the federal courts. Indeed, the Anti-Federalists bitterly attacked the new federal judiciary, claiming that the Supreme Court would be "exalted above all other power in the government," Brutus XV (Mar. 20, 1788), *reprinted in* The Anti-Federalists: Selected Writings and Speeches 476 (Bruce Frohnen ed. 1999), and would have "more power than any court under heaven," 3 Elliot's Debates, at 564 (Grayson); *id.* at 523 (George Mason) (the grant of power to the federal courts was "the most extensive jurisdiction").

The Framers rejected these concerns, recognizing that constitutional limitations on government would be meaningless if individuals did not have recourse to federal courts to vindicate their rights. *See, e.g.*, 3 Debates in the Several State Conventions on the Adoption of the Constitution 554 (Jonathan Elliot ed. 1836) ("[t]o what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection"). Indeed, the existence of the federal courts to vindicate constitutional rights was a powerful argument in favor of the adoption of the Bill of Rights: in March 1789, Thomas Jefferson wrote to James Madison that an "argument[] in favor of a declaration of

rights" that carried "great weight with [him]" was the "legal check which it puts into the hands of the judiciary." 12 The Papers of James Madison 13 (William T. Hutchinson et al., eds. 1961). As Madison explained in proposing the Bill of Rights that June, "[i]f the [Bill of Rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 Annals of Congress, 457 (1789) (Joseph Gales, ed. 1834).

In short, Article III's grant of broad judicial powers to the federal courts ensured that "the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed." 4 Elliot's Debates, at 160 (Davie). The American people recognized that "[t]hese ends can only be accomplished by a general, paramount judiciary." *Id.*

Consistent with the Framers' vision, this Court has long recognized that "no person [should] be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). As the next section demonstrates, interpreting the PLRA to count a dismissal that is pending on appeal as a "strike" raises serious constitutional concerns in light of this fundamental principle.

B. Counting Non-Final Dismissals as "Strikes" Under the PLRA Raises Serious Constitutional Questions

As just discussed, the Framers believed that broad access to the courts was essential to protecting individual liberty and ensuring compliance with the nation's laws. *See supra* at 6-9. Reflecting the Framers' belief that a strong federal judiciary is essential to the protection of individual liberties, this Court has long recognized the important role that the courts play in ensuring fealty to the nation's laws and has ensured that indigent prisoners have full access to the courts to raise fundamental constitutional claims.

In *Griffin v. Illinois*, 351 U.S. 12 (1956), a plurality of this Court held that under the Equal Protection and Due Process Clauses indigent convicted defendants must be "afford[ed] adequate and effective appellate review" and thus could not be required to pay a fee for transcripts needed to appeal their convictions. *Id.* at 20. As this Court explained it, denying the indigent effective appellate review is "a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law." *Id.* at 19. This Court subsequently extended that principle to the habeas context, holding that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Smith v. Bennett*, 365 U.S. 708, 709 (1961); *see Burns v. State of Ohio*, 360 U.S. 252, 258

(1959) ("[t]he imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law").

As these cases make clear, the right to access the courts extends to prisoners. *See Bounds v. Smith*, 430 U.S. 817, 821 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts."). And the right extends beyond claims simply attacking convictions and sentences. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), this Court held that the Due Process Clause "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 579; *id.* (noting that there is "no reasonable distinction between" habeas and civil rights actions and that the right of court access includes litigation related to "basic constitutional rights").

The "three strikes" provision of the PLRA, by requiring even those prisoners who are bringing claims involving fundamental constitutional rights "to pay all filing fees upfront," threatens to impose a "'total barrier' to [prisoners] bringing their claims." *Thomas v. Holder*, 2014 WL 1776000, at *6 (D.C. Cir. May 6, 2014) (Tatel, J., concurring). By deeming a dismissal a "strike" even though an appellate court may ultimately reverse that determination, the court below read the PLRA to impose an even more stringent barrier on prisoners' ability to vindicate their fundamental rights in court. There is thus a serious question whether the

PLRA, so construed, is constitutional under the Due Process and Equal Protection Clauses. *Cf. Thomas*, 2014 WL 1776000, at *4 (Tatel, J., concurring) (expressing "doubts" on the question whether the three strikes provision of the PLRA is constitutional); *id.* at *7 (noting that "several Courts of Appeals have left open the possibility that a prisoner might bring a successful as-applied challenge to the PLRA's three-strikes provision").

These serious constitutional concerns should inform the statutory interpretation of the PLRA's "three strikes" provision. As this Court has repeatedly recognized, "No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." *Parsons v. Bedford*, 3 Pet. 433, 448-49 (1830). Regardless whether the PLRA's "three strikes" provision is constitutional under the majority view, *see Thomas*, 2014 WL 1776000, at *4 (Tatel, J., concurring), it plainly raises serious constitutional concerns under the interpretation adopted by the court below. The lower courts have supplied many reasons why the decision of the court below is wrong, *see* Pet. 11-16, but these serious constitutional concerns—and the underlying constitutional values they reflect—present an additional reason why a dismissal should not count as a strike until it has been affirmed on appeal or the time for appellate review has lapsed.

This Court should grant *certiorari* to address the proper meaning of the term "dismissal" in the PLRA and hold that a non-final dismissal does not

count as a "strike" for purposes of the PLRA's "three strikes" provision.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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JOINT APPENDIX

No. 13-1333

In the Supreme Court of the United States

ANDRÉ LEE COLEMAN,
A/K/A ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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Appendix J:	District court opinion in *Dykehouse*, Mar. 9, 2011
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Appendix L:	Court of appeals order in *Vroman*, Feb. 24, 2014
Appendix M:	District court opinion in *Vroman*, May 27, 2011

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1502

ANDRE LEE COLEMAN, named as "André Lee Coleman-Bey" on complaint, Plaintiff-Appellant

v.

TODD TOLLEFSON, et al.,
Defendants-Appellees

DOCKET ENTRIES

DATE	DKT. NO.	PROCEEDINGS
04/19/2011	1	Prisoner Case Docketed. Notice filed by Appellant André Lee Coleman. Transcript needed: n. (LS)
		* * * * *
04/21/2011	5	Copy of District Court Order filed granting in forma pauperis; change to 1915b. (LS)
		* * * * *
07/18/2011	12	ORDER filed to dismiss for want of prosecution (failure to file appellant brief). (LS)

* * * * *

10/17/2011	20	Appellant MOTION filed by Andre Lee Coleman to reinstate case. Certificate of service: 10/10/2011. (LS)
10/17/2011	21	APPELLANT BRIEF filed by Andre Lee Coleman Copies: 1. Certificate of Service: 10/10/2011. Argument Request: waived. (LS)
10/21/2011	22	ORDER filed granting motion to reinstate case [20] filed by Andre Lee Coleman because the defect was corrected with the filing of the appellant brief. (LS)

* * * * *

4/11/2012	44	APPELLEE BRIEF filed by Mr. Kevin R. Himebaugh for Todd Tollefson, Mary Aho, William Luetzow, Joseph Bouchard, James G. Armstrong and Ms. Kimberley Mieni. Certificate of Service: 04/11/2012. Argument Request: waived. (KRH)

* * * * *

10/23/2013	71	OPINION and JUDGMENT filed: The judgment of the district court is AFFIRMED. Decision for publication. Alice M. Batchelder, Chief Judge; Martha Craig Daughtrey (DISSENTING) and John M. Rogers (AU-

THORING), Circuit Judges. *Pursuant to the court's order and opinion correction letter, both filed of 1/17/14, the opinion attached to this entry has been corrected.–[Edited 01/17/2014 by CL] (CL)

* * * * *

11/27/2013	82	PETITION for en banc rehearing filed by Mr. David M. Zack for Andre Lee Coleman. Certificate of Service: 11/27/2013. (LOCKED; Amended petition for rehearing en banc filed 12/23/2013).–[Edited 12/23/2013 by BLH] (DMZ)

* * * * *

12/06/2013	93	TENDERED amended petition for rehearing en banc. Received from Attorney Mr. David M. Zack for Appellant Andre Lee Coleman. (BLH)

* * * * *

12/23/2013	100	RESPONSE to petition for en banc rehearing, [82], previously filed by filed by Mr. David M. Zack in 11-1502. Response filed by Mr. Kevin R. Himebaugh for Todd Tollefson, Mary Aho, William Luetzow, Joseph Bouchard, James G. Armstrong and Ms. Kimberley Mieni. Certificate of

		service: 12/23/2013. (Response references the amended petition for rehearing filed on 12/23/2013).–[Edited 12/23/2013 by BLH] (KRH)
		* * * *
12/23/2013	101	ORDER filed granting for leave to file an amended petition for rehearing en banc [92] filed by Mr. David M. Zack. Entered by order of the court. (BLH)
		* * * * *
12/23/2013	103	AMENDED PETITION for en banc rehearing filed by Mr. David M. Zack for Andre Lee Coleman. Certificate of Service: 12/06/2013. (BLH)
		* * * * *
01/17/2014	106	ORDER filed denying petition for en banc rehearing [103] filed by Mr. David M. Zack. However, the panel replaces the last two sentences of the first paragraph on page 3 of the opinion: "Under the PLRA, a court must dismiss an action that it finds "frivolous or malicious" sua sponte, without permitting the plaintiff to amend the complaint. McGore v. Wrigglesworth, 114 F.3d 601, 612 (6th Cir. 1997), overruled on other grounds by Jones v. Bock, 549 U.S. 199 (2007); see also 28

		U.S.C. § 1915(e)(2)." The new language: "Under the PLRA, a court may dismiss an action that it finds "frivolous or malicious" without permitting the plaintiff to amend the complaint. LaFountain v. Henry, 716 F.3d 944, 951 (6th Cir. 2013); see also 28 U.S.C. § 1915(e)(2)." A corrected opinion will issue forthwith. Alice M. Batchelder, Chief Circuit Judge; Martha Craig Daughtrey and John M. Rogers, Circuit Judges. (BLH)
		* * * * *
01/28/2014	108	MANDATE ISSUED with no costs taxed. (LS)
05/07/2014	109	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Andre Lee Coleman in 11-1502, 11-1678, 11-1772, 12-1726. Supreme Court Case No: 13-1333, 05/05/2014. [11-1502, 11-1678, 11-1772, 12-1726] (CL)
10/06/2014	110	U.S. Supreme Court letter filed granting the petition for a writ of certiorari [109] filed by Andre Lee Coleman. Supreme Court Case No: 13-1333, 10/02/2014. [11-1502, 11-1678, 11-1772, 12-1726] (CL)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 2:10-cv-00337-RAED-TPG

ANDRE LEE COLEMAN #173324
named as "André Lee Coleman-Bey" on complaint,
Plaintiff

v.

TODD A. TOLLEFSON, et al.,
Defendants

DOCKET ENTRIES

DATE	DKT. NO.	PROCEEDINGS
12/03/2010	1	COMPLAINT with magistrate referral against All Defendants filed by Andre Lee Coleman #173324(cam) (Entered: 12/03/2010)
12/03/2010	2	MOTION for leave to proceed in forma pauperis by plaintiff Andre Lee Coleman #173324; (Attachments: # [1] Financial Documents)(cam) (Entered: 12/03/2010)
01/05/2011	3	LETTER from plaintiff Andre

		Lee Coleman #173324 regarding status of case; *docket sheet sent* (cam) (Entered: 01/05/2011)
		* * * * *
02/15/2011	5	OPINION; signed by Judge R. Allan Edgar (EDTN Judge R. Allan Edgar, pjc) (Entered: 02/15/2011)
02/15/2011	6	ORDER DENYING IFP UNDER THREE STRIKES RULE: plaintiff to pay the entire fee of $350.00 within 28 days or the case will be dismissed; signed by Judge R. Allan Edgar (EDTN Judge R. Allan Edgar, pjc) (Entered: 02/15/2011)
		* * * * *
03/18/2011	8	MOTION to vacate [5], [6] by plaintiff Andre Lee Coleman #173324; (cam) (Entered: 03/18/2011)
03/18/2011	9	OBJECTION re [5], [6] by plaintiff Andre Lee Coleman #173324 (cam) (Entered: 03/18/2011)
03/18/2011	10	MOTION for order named *"Plaintiff's Motion to Make Findings of Fact and Law re: [5] and [6]* by plaintiff Andre Lee Coleman #173324; (cam) Modified text on 3/18/2011 (cam). (Entered: 03/18/2011)

03/18/2011	11	BRIEF in support of MOTION for order *named "Plaintiff's Motion to Make Findings of Fact and Law re: [5] and [6]* [10] filed by Andre Lee Coleman #173324 (Attachments: # [1] Exhibits and Attachments)(cam) (Entered: 03/18/2011)
04/12/2011	12	ORDER denying [8] motion to vacate [5], [6]; denying [10] motion for order; signed by Judge R. Allan Edgar (EDTN Judge R. Allan Edgar, cam) (Entered: 04/12/2011)
04/12/2011	13	ORDER; signed by Judge R. Allan Edgar (EDTN Judge R. Allan Edgar, cam) (Entered: 04/12/2011)
04/12/2011	14	JUDGMENT dismissing case without prejudice; signed by Judge R. Allan Edgar (EDTN Judge R. Allan Edgar, cam) (Entered: 04/12/2011)
		* * * * *
04/18/2011	15	NOTICE OF APPEAL re [5], [6], [14], [12], [13] by plaintiff Andre Lee Coleman #173324 (cam) Modified on 10/21/2011 (cep). (Entered: 04/19/2011)
04/18/2011	16	MOTION for leave to appeal in forma pauperis by plaintiff Andre Lee Coleman #173324; (Attachments: # [1] Financial Doc-

		uments)(cam) (Entered: 04/19/2011)
		* * * * *
04/21/2011	17	ORDER TO PROCEED IN FORMA PAUPERIS ON APPEAL and FOR PAYMENT OF APPEAL FEE: plaintiff to pay an initial partial appeal fee of $2.16 within 28 days; plaintiff to make interim payments until the full appeal fee is paid; signed by Magistrate Judge Timothy P. Greeley (Magistrate Judge Timothy P. Greeley, cpl) (Entered: 04/21/2011)
		* * * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-1726

ANDRE LEE COLEMAN, Plaintiff-Appellant

v.

BERTINA BOWERMAN, Correctional Officer; KIMBERLY HILL, Correctional Officer; MARY BONEVILLE, Hearing Investigator, Defendants-Appellees

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DOCKET ENTRIES

DATE	DKT. NO.	PROCEEDINGS
06/07/2012	1	Prisoner Case Docketed. Notice filed by Appellant Andre Lee Coleman. Transcript needed: n. (RD)
		* * * * *
06/15/2012	6	Copy of District Court Order revoking Plaintiff's in forma pauperis status because he hsa "three strikes" with the meaning of 28 U.S. C. Sec. 1915(g). (RD)
		* * * * *
07/27/2012	12	Appellant MOTION filed by An-

		dre Lee Coleman to proceed in forma pauperis. Certificate of service: 07/13/2012. (RD)
07/27/2012	13	Financial Affidavit filed by Party Andre Lee Coleman Certificate of Service: 07/13/2012. (RD)
		* * * * *
01/10/2014	33	ORDER filed the motion for in forma pauperis status is hereby denied pursuant to 28 U.S.C. Sec. 1915(a)(3). Coleman is directed to pay the appellate filing fee of $455 in full with the district court within 30 days of the filing date of this order, or else this appeal will be dismissed for lack of prosecution. Entered by order of the court. (RD)
02/19/2014	34	ORDER filed to dismiss for want of prosecution for failure to pay the filing fee by February 10, 2014. (RD)
05/07/2014	35	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Andre Lee Coleman in 11-1502, 11-1678, 11-1772, 12-1726. Supreme Court Case No:13-1333, 05/05/2014. [11-1502, 11-1678, 11-1772, 12-1726] (CL)
10/06/2014	36	U.S. Supreme Court letter filed granting the petition for a writ of certiorari [35] filed by Andre Lee

Coleman. Supreme Court Case No: 13-1333, 10/02/2014. [11-1502, 11-1678, 11-1772, 12-1726] (CL)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 2:10-cv-00322-RAED-TPG

ANDRE LEE COLEMAN #173324
named as "André Lee Coleman-Bey,"
Plaintiff

v.

BERTINA M. BOWERMAN, et al.,
Defendants

DOCKET ENTRIES

DATE	DKT. NO.	PROCEEDINGS
11/22/2010	1	COMPLAINT with magistrate referral against All Defendants filed by Andre Lee Coleman #173324 (Attachments: # [1] Exhibits)(cam) (Entered: 11/22/2010)
11/22/2010	2	MOTION for leave to proceed in forma pauperis by plaintiff André Lee Coleman #173324; (Attachments: # [1] Financial Documents)(cam) (Entered: 11/22/2010)

11/22/2010	3	(VACATED by order [23])ORDER TO PROCEED IN FORMA PAUPERIS and FOR PAYMENT OF FILING FEE: plaintiff to pay an initial partial fee of $1.17 when funds are available; plaintiff to make interim payments until the full fee is paid; signed by Magistrate Judge Timothy P. Greeley (Magistrate Judge Timothy P. Greeley, cpl) Modified text on 3/21/2012 (mlc). (Entered: 11/22/2010)
		* * * * *
08/03/2011	11	MOTION for order *to Revoke Plaintiff's In Forma Pauperis Status and to Dismiss* by defendants Mary Boneville, Bertina M. Bowerman; (Himebaugh, Kevin) (Entered: 08/03/2011)
08/03/2011	12	BRIEF in support of MOTION for order *to Revoke Plaintiff's In Forma Pauperis Status and to Dismiss* [11], *Index of Exhibits, and Exhibits A through E* filed by Mary Boneville, Bertina M. Bowerman (Attachments: # [1] Index of Exhibits, # [2] Exhibit A—Coleman v Lentin, 2-92-cv-120.pdf, # [3] Exhibit B—Coleman v Kinnunen, 2-05-cv-256.pdf, # [4] Exhibit C—Coleman v Sweeney, 2-09-cv-178.pdf, # [5] Exhibit D—

		Coleman v Goldstein, 1-10-cv-1194.pdf, # [6] Exhibit E—Shabazz v Campbell (unpublished decision).pdf) (Himebaugh, Kevin) (Entered: 08/03/2011)
		* * * * *
08/22/2011	16	MOTION for order *to Revoke Plaintiff's In Forma Pauperis Status and To Dismiss* by defendant Kimberly Hill; (Himebaugh, Kevin) (Entered: 08/22/2011)
08/22/2011	17	BRIEF in support of MOTION for order *to Revoke Plaintiff's In Forma Pauperis Status and To Dismiss* [16] filed by Kimberly Hill (Himebaugh, Kevin) (Entered: 08/22/2011)
		* * * * *
03/16/2012	22	MEMORANDUM OPINION; signed by Judge R. Allan Edgar (EDTN Judge R. Allan Edgar, cpl) (Entered: 03/16/2012)
03/16/2012	23	ORDER granting [11], [16] motions to revoke IFP status, vacating [3] motion to proceed IFP; DENYING IFP UNDER THREE STRIKES RULE: plaintiff to pay the entire fee of $350.00 within 28 days or the case will be dismissed; signed by

		Judge R. Allan Edgar (EDTN Judge R. Allan Edgar, cpl) (Entered: 03/16/2012)
		* * * * *
05/03/2012	24	ORDER; signed by Judge R. Allan Edgar (Judge R. Allan Edgar, cam) (Entered: 05/03/2012)
05/03/2012	25	JUDGMENT dismissing case without prejudice; signed by Judge R. Allan Edgar (Judge R. Allan Edgar, cam) (Entered: 05/03/2012)
		* * * * *
05/25/2012	26	NOTICE OF APPEAL re [25], [24] by plaintiff André Lee Coleman #173324 (mlc) (Entered: 05/25/2012)
		* * * * *
06/07/2012	29	PRISONER TRUST FUND ACCOUNT statement by plaintiff Andre Lee Coleman #173324 (Attachments: # [1] Financial Documents)(mlc) (Entered: 06/08/2012)
06/14/2012	30	ORDER DENYING IFP: plaintiff to pay the entire appeal fee of $455.00 within 28 days or the appeal may be dismissed by the Sixth Circuit Court of Appeals; signed by Judge R. Allan Edgar (Judge R. Allan Edgar, cam)

(Entered: 06/14/2012)

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1678

ANDRE LEE COLEMAN, Plaintiff-Appellant

v.

STEVEN DYKEHOUSE, Case Manager; RONALD T. EMBRY, Resident Unit Manager; DEBRA OLGER, Corrections Officer; SAM NORMAN, Sergeant, Defendants-Appellees

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DOCKET ENTRIES

DATE	DKT. NO.	PROCEEDINGS
05/25/2011	1	Prisoner Case Docketed. Notice filed by Appellant Andre Lee Coleman. Transcript needed: n. [Three Strikes] (LS)
		* * * * *
08/04/2011	16	Appellant MOTION filed by Andre Lee Coleman to proceed in forma pauperis. Certificate of service: 06/03/2011. (LS)
08/04/2011	17	Financial Affidavit filed by Party André Lee Coleman Certificate of Service: 06/30/2011. (LS)

08/04/2011	18	Prisoner trust account statement filed. (LS)

* * * * *

01/10/2014	47	ORDER filed denying motion to proceed ifp [16] filed by Andre Lee Coleman. Coleman is directed to pay the appellate filing fee of $455 in full with the district court within 30 days of this order, or else the appeal will be dismissed for lack of prosecution. Entered by order of the court. (CL)
02/11/2014	48	ORDER filed to dismiss for want of prosecution for failure to pay the fee. (LS)
05/07/2014	49	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant André Lee Coleman in 11-1502, 11-1678, 11-1772, 12-1726. Supreme Court Case No: 13-1333, 05/05/2014. [11-1502, 11-1678, 11-1772, 12-1726] (CL)
10/06/2014	50	U.S. Supreme Court letter filed granting the petition for a writ of certiorari [49] filed by André Lee Coleman. Supreme Court Case No: 13-1333, 10/02/2014. [11-1502, 11-1678, 11-1772, 12-1726] (CL)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1-11-cv-00108-GJQ-ESC

ANDRE LEE COLEMAN #173324
named as "André Lee Coleman-Bey,"
Plaintiff

v.

STEVEN DYKEHOUSE, et al.,
Defendants

DOCKET ENTRIES

DATE	DKT. NO.	PROCEEDINGS
01/28/2011	1	COMPLAINT with magistrate referral *and jury demand* against Stephen Dykehouse, Ronald T. Embry, Sam Norman, Debra S. Olger filed by Andre Lee Coleman #173324 (Attachments: # [1] Attachment 1) (rmw) (Entered: 02/01/2011)
01/28/2011	2	APPLICATION TO PROCEED without prepayment of fees and affidavit (Attachments: # [1] Financial Documents) (rmw) (En-

		tered: 02/01/2011)
03/04/2011	3	LETTER from plaintiff Andre Lee Coleman #173324 regarding status of case; *sent docket sheet 3/4/11* (elc) (Entered: 03/04/2011)
03/09/2011	4	OPINION DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* – THREE STRIKES; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, jmt) (Entered: 03/09/2011)
03/09/2011	5	ORDER DENYING IFP UNDER THREE STRIKES RULE: plaintiff to pay the entire fee of $350.00 within 28 days or the case will be dismissed; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, jmt) (Entered: 03/09/2011)
		* * * * *
04/01/2011	6	MOTION for reconsideration re [5] by plaintiff Andre Lee Coleman #173324; (mrs) (Entered: 04/01/2011)
04/01/2011	7	BRIEF in support of MOTION for reconsideration re [5] [6] filed by Andre Lee Coleman #173324 (Attachments: # [1] Attachment – Exhibits 1 and 2, # [2] Attachment – Exhibits 1 thru 5, # [3] Attachment – Exhibits 1 thru

		3)(mrs) (Entered: 04/01/2011)
05/06/2011	8	ORDER denying [6] motion for reconsideration; Plaintiff's custodial agent to collect and remit $350 filing fee; no good−faith basis for appeal; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, jmt) (Entered: 05/06/2011)
05/06/2011	9	JUDGMENT dismissing case without prejudice; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, jmt) (Entered: 05/06/2011)
		* * * * *
05/23/2011	10	NOTICE OF APPEAL re [9], [5], [8] by plaintiff Andre Lee Coleman #173324 (mkc) (Entered: 05/24/2011)
05/23/2011	11	MOTION for leave to appeal in forma pauperis by plaintiff Andre Lee Coleman #173324; (mkc) (Entered: 05/24/2011)
		* * * * *
06/13/2011	12	SECOND MOTION for leave to appeal in forma pauperis *(filed per Sixth Circuit)* by plaintiff Andre Lee Coleman #173324; (kvt) (Entered: 06/20/2011)
06/13/2011	13	FINANCIAL AFFIDAVIT re [12] by plaintiff Andre Lee Coleman #173324 (Attachments:

		# [1] Certificate of Prisoner Trust Account) (kvt) Modified text on 6/20/2011 (kvt). (Entered: 06/20/2011)
07/07/2011	14	LETTER FROM CCA regarding IFP re appeal [10] indicating that the District Court has not assessed the filing fee (ald) (Entered: 07/07/2011)
07/07/2011	15	ORDER DENYING IFP: plaintiff to pay the entire appeal fee of $455.00 within 28 days or the appeal may be dismissed by the Sixth Circuit Court of Appeals; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, jmt) (Entered: 07/07/2011)

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11-1772

ANDRE LEE COLEMAN, named as
"André Lee Coleman-Bey,"
Plaintiff-Appellant

v.

AARON J. VROMAN, ARUS, in his Official and Individual Capacities; MARY F. FATE, RUM, in her Official and Individual Capacities,
Defendants-Appellees

DOCKET ENTRIES

DATE	DKT. NO.	PROCEEDINGS
06/17/2011	1	Prisoner Case Docketed. Notice of appeal filed by Appellant Andre Lee Coleman. Transcript needed: n. (BLC)
		* * * * *
06/30/2011	8	Copy of 6/20/11 District Court Order filed denying in forma pauperis; based on prior "three strikes" denial. (BLC)
		* * * * *

07/18/2011	10	Appellant MOTION filed by Andre Lee Coleman to proceed in forma pauperis. Certificate of service: served by clerk's office. (BLC)
07/18/2011	11	Financial Affidavit filed by Party Andre Lee Coleman Certificate of Service: served by clerk's office. (BLC)

* * * * *

01/10/2014	33	ORDER filed DENYING motion to proceed ifp [10] filed by André Lee Coleman. Coleman is directed to pay the appellate filing fee of $455 in full with the district court within 30 days of the filing date of this order, or else this appeal will be dismissed for lack of prosecution. Entered by order of the court. (BLC)
02/24/2014	34	ORDER filed to DISMISS case for want of prosecution; the appellant has not paid the filing fees. (BLC)
05/07/2014	35	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Andre Lee Coleman in 11-1502, 11-1678, 11-1772, 12-1726. Supreme Court Case No: 13-1333, 05/05/2014. [11-1502, 11-1678, 11-1772, 12-1726] (CL)

10/06/2014	36	U.S. Supreme Court letter filed granting the petition for a writ of certiorari [35] filed by André Lee Coleman. Supreme Court Case No: 13-1333, 10/02/2014. [11-1502, 11-1678, 11-1772, 12-1726] (CL)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 1:10-cv-00354-JTN-ESC

ANDRE LEE COLEMAN #173324
named as "André Lee Coleman-Bey,"
Plaintiff

v.

AARON VROMAN, MARY E. FATE,
Defendants

DOCKET ENTRIES

DATE	DKT. NO.	PROCEEDINGS
04/14/2010	1	COMPLAINT with magistrate referral against Aaron J. Vroman, Mary E. Fate filed by Andre Lee Coleman #173324 (Attachments: # [1] Attachment 1)(cr) (Entered: 04/20/2010)
04/14/2010	2	PRISONER TRUST FUND ACCOUNT statement by plaintiff Andre Lee Coleman #173324(cr) (Entered: 04/20/2010)
04/27/2010	3	ORDER TO PROCEED IN

FORMA PAUPERIS and FOR PAYMENT OF FILING FEE: plaintiff to pay an initial partial fee of $.83 within 28 days; plaintiff to make interim payments until the full fee is paid; initial partial filing fee to be submitted by 5/25/2010; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, jal) Modified text on 5/7/2010 (lep). (Entered: 04/27/2010)

* * * * *

01/10/2011	31	MOTION for order *to Revoke Plaintiff's In Forma Pauperis Status and to Dismiss* by defendant Aaron J. Vroman; (Himebaugh, Kevin) (Entered: 01/10/2011)
01/10/2011	32	BRIEF in support of MOTION for order *to Revoke Plaintiff's In Forma Pauperis Status and to Dismiss* [31], *Index of Exhibits, and Exhibits A through D* filed by Aaron J. Vroman (Attachments: # [1] Index of Exhibits, # [2] Exhibit A—Coleman v Lentin, 2-92-cv-120.pdf, # [3] Exhibit B—Coleman v Kinnunen, 1-10-cv-354.pdf, # [4] Exhibit C—Coleman v Sweeney, 2-09-cv-178.pdf, # [5] Exhibit D—Shabazz v Campell (un-

published decision).pdf) (Himebaugh, Kevin) (Entered: 01/10/2011)

* * * * *

03/10/2011	42	RESPONSE TO MOTION for order *to Revoke Plaintiff's In Forma Pauperis Status and to Dismiss* [31] filed by Andre Lee Coleman #173324 (mrs) (Entered: 03/10/2011)
03/10/2011	43	BRIEF by plaintiff André Lee Coleman #173324 re 42 (Attachments: # [1] Index of Exhibits, # [2] Exhibits 1 thru 3, # [3] Exhibits 4 thru 6, # [4] Exhibits 7 thru 10)(mrs) (Entered: 03/10/2011)

* * * * *

03/10/2011	45	REPLY to response to motion [31] *Based on Three Strikes, Index of Exhibits, and Exhibit 1* filed by Aaron J. Vroman (Attachments: # [1] Index of Exhibits, # [2] Exhibit 1—Order 1-11-cv-108.pdf) (Himebaugh, Kevin) (Entered: 03/10/2011)

* * * * *

03/23/2011	47	REPORT AND RECOMMENDATION that Defendant Vroman's Motion to Revoke In Forma Pauperis Status [31] be granted and Plaintiff's in forma

		pauperis status be revoked; objections to RRdue within 14 days; signed by Magistrate Judge Ellen S. Carmody (Magistrate Judge Ellen S. Carmody, jal) (Entered: 03/23/2011)
		* * * * *
03/28/2011	48	OBJECTION re [45] by plaintiff Andre Lee Coleman #173324 (Attachments: # [1] Index of Exhibits, # [2] Exhibit 1, # [3] Exhibit 2)(gjf) (Entered: 03/28/2011)
		* * * * *
04/15/2011	50	OBJECTION by plaintiff Andre Lee Coleman #173324 to Report and Recommendation [47] (Attachments: # [1] Exhibit List, # [2] Exhibits)(mrs) (Entered: 04/15/2011)
		* * * * *
05/27/2011	52	ORDER APPROVING AND ADOPTING REPORT AND RECOMMENDATION [47]; Defendant's Motion to Revoke Plaintiff's In Forma Pauperis Status [31] is granted; Plaintiff's In Forma Pauperis Status is revoked; Plaintiff is required to submit the entire filing fee within 30 days or the case will be dismissed; signed by Judge Janet T. Neff (Judge Janet T. Neff, rmw)

(Entered: 05/27/2011)

* * * * *

06/16/2011	53	NOTICE OF INTERLOCUTORY APPEAL re [17], [52] by plaintiff Andre Lee Coleman #173324 (elc) Modified text on 6/17/2011 (elc). (Entered: 06/16/2011
06/16/2011	54	MOTION for leave to appeal in forma pauperis by plaintiff Andre Lee Coleman #173324; (Attachments: # [1] Financial Documents)(elc) (Entered: 06/16/2011)

* * * * *

06/20/2011	55	ORDER DENYING IFP ON APPEAL: plaintiff to pay the entire appeal fee of $455.00 within 28 days or the appeal may be dismissed by the Sixth Circuit Court of Appeals; signed by Judge Janet T. Neff (Judge Janet T. Neff, rmw) (Entered: 06/20/2011)

* * * * *

07/13/2011	56	ORDER DISMISSING CASE: the Court will issue a Judgment dismissing the complaint without prejudice for lack of prosecution; signed by Judge Janet T. Neff (Judge Janet T. Neff, rmw) (Entered: 07/13/2011)

07/13/2011	57	JUDGMENT dismissing case without prejudice; signed by Judge Janet T. Neff (Judge Janet T. Neff, rmw) (Entered: 07/13/2011)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 2:92-cv-120

ANDRÉ LEE COLEMAN, Plaintiff,

v.

KIM B. LENTIN, et al., Defendants.

May 28, 1992

REPORT AND RECOMMENDATION

Plaintiff André Lee Coleman, an inmate at Marquette Branch Prison (MBP), Marquette, Michigan, filed this civil rights action pursuant to 42 U.S.C. § 1983 against Kim Lentin, a corrections officer at MBP, and Thomas Osier, Deputy Warden at MBP. Plaintiff alleges in his complaint that in December of 1989 he was issued three minor misconducts for excessive noise and destruction of property. Thereafter, a hearing was conducted by defendant Lentin, who found plaintiff guilty of the misconducts. Plaintiff maintains defendant Lentin found him guilty of the misconducts without first contacting defense witnesses or accusing guards to resolve factual disputes. Plaintiff received a 45-day loss of privileges and a monetary assessment for the destroyed property. Plaintiff thereafter appealed to defendant Osier. All three appeals were dismissed by defendant Osier. Plain-

tiff maintains the actions of the defendants were in violation of his due process rights.

The primary federal issue presented is whether there was a violation of plaintiff's constitutional right of due process under the Fourteenth Amendment. Plaintiff alleges that the defendants' conduct was obdurate and wanton and resulted in his being unfairly punished. Even assuming that what plaintiff says is true, plaintiff has not stated a viable due process claim.

The only protection against arbitrary state conduct grounded in the Constitution is found in the Due Process Clause. In all cases where a person stands to be deprived of his life, liberty or property, he is entitled to due process of law. This due process of law gives the person the opportunity to convince an unbiased decision maker that, for example, he has been wrongly or falsely accused or that the evidence against him is false. The Due Process clause does not guarantee that the procedure will produce a correct decision. "It must be remembered that even if a state decision does deprive an individual of life, [liberty], or property, and even if that decision is erroneous, it does not necessarily follow that the decision violated that individual's right to due process." *Martinez v. California*, 444 U.S. 277, 284, n.9 (1980). "[T]he deprivation by state action of a constitutionally protected interest in "life, liberty or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (emphasis in original).

The function of this court is not to provide *de novo* review of the decision made by the hearings officer, or to ensure that the decision was correct. It is not the role of the federal court to assess the credibility of the witnesses, weigh the evidence, or second guess the fact-finder's

decision. *Superintendent, Massachusetts Correctional Institute at Walpole v. Hill*, 472 U.S. 445 (1985); *see also, Chambers v. Koehler*, 635 F. Supp. 884, 888 (W.D. Mich. 1984). The function of this court is to ensure that the plaintiff's constitutional right to due process of law was not arbitrarily denied or abrogated. So long as plaintiff received that process which was due under the Constitution, plaintiff's procedural due process rights are not violated by a wrong result or improper motivation.

Under the Constitution, prison inmates subject to disciplinary action are entitled to the following process: (1) 24 hours advance written notice of the charges; (2) an opportunity to appear at a hearing, to call witnesses, and present rebuttal evidence when permitting the inmate to do so will not be unduly hazardous to institutional safety; and (3) a written statement by the factfinders as to the evidence relied upon for their decision. *Wolff v. McDonnell*, 418 U.S. 539, 564-66 (1983). If the prisoner received these procedural protections, and if there were "some facts" to support the decision of the hearings officer, then the prisoner received all the process to which he was due. *Superintendent of Massachusetts Institute, Walpole v. Hill*, 472 U.S. 445 (1985). A review of the plaintiff's complaint and the record herein establishes that there are some facts which support the findings of the hearings officers. *See also Hanrahan v. Lane*, 747 F.2d 1137 (7th Cir. 1984).

However, plaintiff claims that for one reason or another the hearing which he received was defective. In order to state a colorable claim, a plaintiff alleging a procedural due process violation must show that the deprivation was caused by action taken pursuant to established state procedures. *Hudson v. Palmer*, 468 U.S. 517, 532 (1984); *Logan v. Zimmerman Brush Co.*, 455

U.S. 422, 435-436 (1981). Michigan's established procedures comport with due process requirements. Under Administrative Rules 791.3310 and 791.3315, plaintiff had all of the rights delineated in *Wolff, supra.*

Assuming that plaintiff was not actually given those rights, plaintiff herein fails to make the required distinction between challenging the "established state procedure" itself and the failure of the state employee to follow that procedure. If the official performing the state procedure fails to follow the state procedure or conform his conduct to state law, the plaintiff's injury is the result of a "random and unauthorized act" which the state was unable to foresee and thus prevent. The Supreme Court in *Parratt v. Taylor*, 451 U.S. 527 (1981), held that no procedural due process violation occurs when the deprivation is the result of a "random and unauthorized act," unless the state failed to provide the plaintiff with an "adequate post-deprivation remedy."

> Application of the principles recited above to this case leads us to conclude the respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the state to follow established state procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing. Moreover, the State of Nebraska has pro-

> vided respondent with the means by which he can receive redress for the deprivation.

Id. at 543.

In an analogous case, *Branham v. Spurgis*, 720 F.Supp. 605 (W.D. Mich. 1989), the court faced a similar challenge to a guilty finding on a prison misconduct citation. In *Branham*, the inmate argued that the "due process" that he received was inadequate. The court explained:

> Plaintiff's claim is clearly premised upon an alleged unauthorized act, not an established state policy. Plaintiff alleges that the policy of the Department of Corrections, as established by the state administrative rules, provides that inmates may offer documents and request disqualification of a hearing officer at a misconduct hearing. Mich. Admin. Rule R791.3315(5)(a), (f). Plaintiff contends that defendant violated established policy by failing to allow plaintiff to do so. Accepting plaintiff's allegations as true, the court determines that plaintiff's claim is premised on a random and unauthorized act within the meaning of *Parratt v. Taylor*.
>
> In the Sixth Circuit, plaintiffs who assert procedural due-process claims premised upon unauthorized acts of state officials must plead and prove the inadequacy of state post-conviction remedies. *Vicory v. Walton*, 721 F.2d 1062, 1066 (6th Cir. 1983), *cert. denied*, 469 U.S. 834, 105 S. Ct. 125, 83 L. Ed. 2d 67 (1984). Plaintiff has

> not and cannot meet this burden. Michigan law provides effective remedies for review of prisoners' misconduct convictions and vindication of their right to due process in the disciplinary proceedings. Michigan statutory law, Mich. Comp. Laws § 791.254, provides for rehearing of prison disciplinary decisions on the ground, among others, that "[t]he prisoner's due process rights were violated." *Id.* at § 791.254(2)(c). If a request for rehearing is ultimately unsuccessful, plaintiff has a right to judicial review in state court. Mich. Comp. Laws § 791.255.

Id. at 607-608.

The *Branham* court found that the ability of the plaintiff to request a rehearing and seek judicial review of the decision provided more than adequate post-deprivation remedies for the alleged procedural due process violation.

Likewise, in this similar action, plaintiff's right of due process was adequately protected by the opportunity to appeal the defendants' decisions through several levels of appeals. *See also Abdur-Rahman v. Settles,* 1988 U.S. App. LEXIS 6448 (6th Cir. May 18, 1988). In a minor misconduct matter, plaintiff is entitled to appeal first to the Assistant Deputy Warden, Camp Supervisor, or Community Program Supervisor. PD-DWA-60.01. From there, plaintiff was entitled to seek judicial review pursuant to the Michigan Administrative Procedures Act. *Seaton-El v. M.D.O.C.*, No. 127137 (Mich. App. October 24, 1991). Discretionary appeals of the state court's decision are available all the way to the state supreme court. Michigan has thus provided opportunities

to seek relief for the procedural defects plaintiff alleges. Therefore, in the opinion of the undersigned, plaintiff has not stated a viable procedural due process claim.

For the reasons stated above, it is recommended that plaintiff's complaint be dismissed as frivolous and without merit, pursuant to 28 U.S.C. § 1915(d).

Finally, if the court elects not to adopt the recommendations of the undersigned, it is recommended that the court require the plaintiff to pay a reduced filing fee in order to proceed in this matter. W.D. Mich. L.R. 7.[1]

Objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of receipt of this Report and Recommendation, 28 U.S.C.

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[1] Rule 7(a)(2) provides:

> Determination of pauper status – A petition for leave to proceed in forma pauperis shall be presented by the clerk to any available magistrate judge. If the financial affidavit discloses that the person is unable to pay the full filing fee or fees for service of process, the magistrate judge shall grant the petition for pauper status. The magistrate judge may nevertheless order that the person pay, within a specified period, a reduced fee, defined as the greater of: (i) twenty (20) percent of the person's liquid assets including any prison account; or (ii) five (5) percent of the total deposits placed in the prison account during the six (6) months preceding the signing of the financial affidavit. The magistrate judge may make any other appropriate order concerning the payment of a reduced fee. Any party may seek review of a magistrate judge's order pursuant to W.D. Mich. L.R. 13(a). If the person fails to comply with the order for payment for a reduced fee, the case may be dismissed without prejudice by the district judge.

§ 636(b)(1)(c). Failure to file objections within the specified time waives the right to appeal the district court's order. *Thomas v. Arn*, 474 U.S. 140 (1985).

Dated: May 28, 1992

s/ Timothy P. Greeley
TIMOTHY P GREELEY
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 2:92-cv-120

ANDRÉ LEE COLEMAN, Plaintiff,

v.

KIM B. LENTIN, et al., Defendant(s).

July 2, 1992

ORDER AND JUDGMENT APPROVING REPORT AND RECOMMENDATION

The court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action. The Report and Recommendation was duly served on the parties, and no objection has been made thereto within the time required by law.

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge is approved and adopted as the opinion of the court.

IT IS FURTHER ORDERED that plaintiff's complaint is DISMISSED.

Dated: July 2, 1992

s/ Douglas W. Hillman
DOUGLAS W. HILLMAN
SENIOR JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 2:92-cv-120

ANDRÉ LEE COLEMAN, Plaintiff,

v.

KIM B. LENTIN, et al., Defendants.

July 17, 1992

ORDER

On May 28, 1992, Magistrate Judge Timothy P. Greeley issued a Report and Recommendation in this matter, recommending that plaintiff's complaint be dismissed. On June 29, 1992, plaintiff filed a motion for an enlargement of time to file objections to the Report and Recommendation. On July 2, 1992, an Order and Judgment Approving Report and Recommendation was issued, dismissing plaintiff's complaint.

Because plaintiff's motion for enlargement of time was filed prior to this court's Order and Judgment, this court's Order and Judgment will be vacated and plaintiff will be given an opportunity to file objections to the Report and Recommendation. Therefore,

IT IS HEREBY ORDERED that the Order and Judgment Approving Report and Recommendation issued July 2, 1992, is VACATED.

IT IS FURTHER ORDERED that plaintiff shall file objections to the Report and Recommendation within 30 days of the date of this order.

IT IS SO ORDERED.

Dated: July 17, 1992

s/ Douglas W. Hillman
DOUGLAS W. HILLMAN
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 2:92-cv-120

ANDRÉ LEE COLEMAN, Plaintiff,

v.

KIM B. LENTIN, et al., Defendant(s).

August 31, 1992

ORDER AND JUDGMENT APPROVING REPORT AND RECOMMENDATION

The court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action. The Report and Recommendation was duly served on the parties, and no objection has been made thereto within the time required by law.

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge is approved and adopted as the opinion of the court.

IT IS FURTHER ORDERED that plaintiff's complaint is DISMISSED.

Dated: August 31, 1992

s/ Douglas W. Hillman
DOUGLAS W. HILLMAN
SENIOR JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 2:05-cv-256

ANDRE LEE COLEMAN, Plaintiff,

v.

DONALD W. KINNUNEN, Defendant.

March 17, 2008

OPINION

Plaintiff Andre Lee Coleman filed this *pro se* civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that defendant, former Alger County Circuit Court Clerk, failed to file a petition for judicial review of a prison disciplinary decision. Defendant returned the petition to plaintiff advising plaintiff to file the petition in the county where the prison was located and the offense occurred. Plaintiff argues that defendant had no authority to reject his petition. The only remaining claim is for injunctive relief.

Defendant has filed a motion to dismiss. A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the pleading, requiring the court to determine whether the plaintiff would be entitled to relief if everything alleged in the complaint is true. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). "[A] complaint should not be dis-

missed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle [the plaintiff] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court must construe the complaint in the light most favorable to plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A judge may not dismiss the complaint simply because he disbelieves the complaint's factual allegations. *Conley*, *supra*, at 47.

Generally, a complaint need only give "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *In re Delorean Motor Co. v. Weitzman*, 991 F.2d 1236, 1240 (6th Cir. 1993) (*quoting Conley*, 355. U.S. at 47). The fundamental purpose of pleadings under the Federal Rules of Civil Procedure is to give adequate notice to the parties of each side's claims and to allow cases to be decided on the merits after an adequate development of the facts. *Mayer*, 988 F.2d at 638. While this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions. *Delorean*, 991 F.2d at 1240. "In practice, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Id.* (internal quote omitted).

Plaintiff has filed a motion for partial summary judgment arguing that he is entitled to damages. Plaintiff's claim for damages has been dismissed by this court. This court previously held and the Sixth Circuit affirmed that defendant is entitled to quasi-judicial immunity from monetary damages.

Defendant argues that quasi-judicial immunity bars plaintiff's claim for injunctive relief. The Federal Courts Improvement Act of 1996 amended 42 U.S.C. § 1983 by providing that "in any action brought against a judicial

officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." *Montero v. Travis*, 171 F.3d 757 (2d Cir. 1999). Plaintiff has not addressed this argument or its applicability to defendant. Plaintiff has not alleged a violation of a declaratory decree nor the unavoidability of declaratory relief.

Moreover, plaintiff has never asked the Michigan Court of Appeals for relief from defendant's action. Plaintiff could have filed a complaint for superintending control asking for an order directing the lower court to file his action. MCR 3.302. Further, plaintiff cannot support a denial of his access to the courts claim. In order to state a viable claim for interference with his access to the courts, a plaintiff must show "actual injury." *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *see also Talley-Bey v. Knebl*, 168 F.3d 884, 886 (6th Cir. 1999); *Knop v. Johnson*, 977 F.2d 996, 1000 (6th Cir. 1992); *Ryder v. Ochten*, No. 96-2043, 1997 WL 720482, *1-2 (6th Cir. Nov. 12, 1997). Plaintiff cannot show that he suffered actual injury from defendant's conduct. Plaintiff could have attempted to file a new action showing that Alger County was the proper venue for his lawsuit. Plaintiff could have filed a complaint for superintending control. Plaintiff's right to access the courts was not violated by defendant's conduct because plaintiff has not alleged an actual injury.

To the extent that plaintiff has attempted to raise a state law claim in his amended complaint those claims shall be dismissed. Pendent jurisdiction over state law claims cannot be exercised after all federal claims have been dismissed. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-727 (1966); *Smith v. Freland*, 954 F.2d 343,

348 (6th Cir.), *cert denied*, 504 U.S. 915 (1992). Accordingly, defendant's motion to dismiss (docket #29) will be granted and plaintiff's motion for partial summary judgment (docket #45) will be denied.

The Court further concludes that an appeal of this action would not be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). For the same reasons that the court grants defendant's motion to dismiss, the court can discern no good-faith basis for an appeal. Should the plaintiff appeal this decision, the court will assess the $455 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610-11, unless plaintiff is barred from proceeding *in forma pauperis*, e.g., by the "three-strikes" rule of § 1915(g). If he is barred, Plaintiff will be required to pay the $455 appellate filing fee in one lump sum.

Date: March 17, 2008

s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-1497

ANDRE LEE COLEMAN-BEY, Plaintiff-Appellant,

v.

DONALD W. KINNUNEN, named as Former Circuit Court Clerk, in his individual and official capacity, Defendant-Appellee.

March 5, 2009

ORDER

Before: DAUGHTREY, ROGERS, and KETHLEDGE, Circuit Judges.

Andre Lee Coleman-Bey appeals pro se from a district court judgment that dismissed his civil rights action filed under 42 U.S.C. § 1983. His appeal has been referred to a panel of this court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, the panel unanimously agrees that oral argument is not needed in this case. Fed. R. App. P. 34(a).

Coleman-Bey alleged that a former Michigan court clerk violated his constitutional rights by failing to file his petition for judicial review of a prison disciplinary decision. He sought damages and an order directing the defendant to file the disputed petition in state court.

The district court initially dismissed the case in 2005, ruling that monetary relief was barred by quasi-judicial immunity and that injunctive relief was barred by the *Rooker-Feldman* doctrine. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). A panel of this court held that the *Rooker-Feldman* doctrine was not applicable. Thus, the judgment was affirmed insofar as it dismissed Coleman-Bey's claim for monetary relief and vacated insofar as it denied his claim for injunctive relief.

The district court granted the defendant's motion upon remand, and dismissed Coleman-Bey's injunctive claim on March 17, 2008. *See* Fed. R. Civ. P. 12(b)(6). The court noted that he had not alleged that the clerk violated a declaratory decree or that declaratory relief was unavailable and that he had not alleged an actual injury regarding the clerk's actions. It is from this judgment that Coleman-Bey now appeals, requesting the appointment of counsel on appeal.

We review the dismissal of Coleman-Bey's remaining claim *de novo*. *See Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008). A case may be dismissed under Rule 12(b)(6) if the plaintiff fails to raise a claim upon which relief may be granted. We conclude that dismissal was appropriate in the present case.

"The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). Coleman-Bey did not meet this test because he could have obtained relief by filing a complaint for superintending control under Mich. Ct. R. 3.302. An action for superintending control is an original civil action, rather than an appeal. The purpose of such

an action is "to order a defendant to perform a clear legal duty." *Fort v. City of Detroit*, 381 N.W.2d 754, 756 (Mich. Ct. App. 1985). Relief is available under Rule 3.302 when a Michigan court clerk improperly rejects a document for filing. *See In re Credit Acceptance*, 733 N.W.2d 65, 68-71 (Mich. Ct. App. 2007). In light of this remedy, Coleman-Bey has not raised a cognizable claim for injunctive relief in the federal courts. *See Beacon Theatres, Inc.*, 359 U.S. at 506-07; *Bolin v. Story*, 225 F.3d 1234, 1242-43 (11th Cir. 2000).

Accordingly, Coleman-Bey's request for counsel is denied and the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green
Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

No. 2:09-cv-178

ANDRE LEE COLEMAN, Plaintiff,

v.

BRIAN SWEENEY, et al., Defendants.

October 8, 2009

OPINION

This is a civil rights action brought by a state prisoner pursuant to 42 U.S.C. § 1983. The Court has granted Plaintiff leave to proceed *in forma pauperis*. Under the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996), the Court is required to dismiss any prisoner action brought under federal law if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. §§ 1915(e)(2), 1915A; 42 U.S.C. § 1997e(c). The Court must read Plaintiff's *pro se* complaint indulgently, *see* *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and accept Plaintiff's allegations as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). Applying these standards, Plaintiff's action will be dismissed for failure to state a claim.

DISCUSSION

I. Factual allegations

Plaintiff currently is incarcerated at Baraga Maximum Correctional Facility (AMF). In his *pro se* complaint, he sues Michigan Department of Corrections Deputy Director of Administration and Programs Barry McLemore and the following AMF employees: Assistant Warden Ralph Napel, Retired Assistant Deputy William Leutzow, Administrative Assistant Janice Ansell, Assistant Resident Unit Manager (ARUS) Brian Sweeney, Resident Unit Managers (RUM) Ralph Sackett and Kimberly Meni.

Plaintiff alleges that on December 15, 2005, the Clerk's office of the Ingham County Circuit Court returned to Plaintiff a money order and request for rehearing because the money order for the initial partial filing fee was made payable to the "State of Michigan" instead of the "30th Circuit Court." (Compl. at 9, docket #1.) On December 22, 2005, Plaintiff received delivery of the legal mail, but the money order was removed and Plaintiff was given a contraband removal receipt. (*Id.* at 10.) Plaintiff alleges that this removal was in violation of Mich. Dep't of Corr., Policy Directive 04.02.105. (*Id.*) On December 27, 2005, Plaintiff received delivery of the return of two additional pleadings filed with the Ingham County Circuit Court with money orders made payable to "State of Michigan." Those money orders were also removed and Plaintiff was given the legal mail and a contraband removal receipt for the money orders. (*Id.* at 11.)

Plaintiff alleges that he had twenty-one days to return the initial partial filing fees to the Ingham County Circuit Court. (*Id.* at 12-13.) He states that Defendants

Sackett and Sweeney were made aware of the time limitation, but did not deposit the funds into his account because the money orders were not made payable to Plaintiff. On January 12, 2006, Plaintiff filed a "flash kite" and was interviewed by Defendant Leutzow. (*Id.* at 3.) On January 20, 2006, Petitioner filed a second flash kite because he had not yet received the funds. (*Id.* at 13-14.) On January 25, 2006, Defendant Napel answered Plaintiff's kite informing him that Defendant Sweeney would hold a hearing the next day. (*Id.* at 14.) Plaintiff received a hearing on January 26, 2006. He alleges that Defendant Sweeney retaliated against him for use of the "flash kite system" by having the hearing in order to delay Plaintiff's attempts to have the money orders returned. (*Id.* at 14-15.) Plaintiff received that results of the administrative hearing on January 30, 2006, after writing to Defendant Leutzow. (*Id.* at 15.)

On February 6, 2006, Plaintiff initiated two separate grievances. The first was against Defendants Sweeney, Sackett and the mail room supervisor. (*Id.*) He was interviewed by Defendant Meni. On March 1, 2006, Plaintiff received a response finding that the legal mail was properly handled. (*Id.* at 15-16.) Defendant Leutzow signed and approved this response. Defendant Sackett answered the second grievance against Defendant Sweeney stating that the money orders were handled properly and that there was no violation of Plaintiff's due process rights. (*Id.* 16-17.) Defendant Leutzow signed and approved both the responses.

Plaintiff appealed both responses. He appealed the first grievance on March 6, 2006, but Defendant Ansell stated that she did not receive it until April 3, 2006. Plaintiff appealed the other grievance on March 17, 2006, though Defendant Ansell claimed that she did not re-

ceive it until April 13, 2006. Defendant McLemore rejected both his appeals on April 19, 2006. (*Id.* at 17-18; Ex. at 15, 16.)

Plaintiff asserts that Mich. Dep't. of Corr., Policy Directive 04.05.105 § I requires Defendant Napel to have returned the money orders to Ingham County Circuit Court with an explanation of why they were returned. (*Id.* at 19.)

Plaintiff raises nine claims for relief. First, Defendants Sweeney and Sackett denied his access to the courts. (*Id.* at 20-21.) Second, Defendants Sweeney and Sackett retaliated against him for filing flash kites. Third, Defendant Sweeney retaliated against him by conducting an administrative hearing and, after being contacted by Defendant Napel, destroying the money orders. Fourth, Defendant Leutzow "silently condoned and encouraged" that action of Defendants Sweeney and Sackett. (*Id.* at 22.) Fifth, Defendant Leutzow and Meni's inactions and failure to follow policy directives denied Plaintiff's access to the courts. Sixth, Defendant Leutzow and Sackett denied his access to the court by denying his appeal of his grievances. (*Id.*) Seventh, Defendants Ansell and McLemore denied his access to the courts by not timely deciding his grievances appeals. (*Id.* at 23.) Eighth, Defendants Ansell and Napel knew of the actions of Defendants Sweeney and Sackett and did not return the money orders to Plaintiff. Ninth, Plaintiff was denied access to the Court by Defendants' "combined actions and inactions." (*Id.* at 23-24.)

For relief, Plaintiff requests a jury trial, compensatory and punitive damages, all court debts to be cleared from his account and a transfer to a Security Level II facility. (*Id.* at 24.)

II. Failure to state a claim

A complaint may be dismissed for failure to state a claim if "'it fails to give the defendant fair notice of what the . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). While a complaint need not contain detailed factual allegations, a plaintiff's allegations must include more than labels and conclusions. *Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). The court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 129 S. Ct. at 1949. Although the plausibility standard is not equivalent to a "'probability requirement,'. . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n] – that the pleader is entitled to relief." *Ashcroft*, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must show that the deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996).

Because § 1983 is a method for vindicating federal rights, not a source of substantive rights itself, the first step in an action under § 1983 is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

A. Access to the Court

In *Bounds v. Smith*, 430 U.S. 817 (1977), the Supreme Court recognized a prisoner's fundamental right of access to the courts. While the right of access to the courts does not allow a State to prevent an inmate from bringing a grievance to court, it also does not require the State to enable a prisoner to discover grievances or litigate effectively. *Lewis v. Casey*, 518 U.S. 343 (1996). Thus, *Bounds* did not create an abstract, free-standing right to a law library, litigation tools, or legal assistance. *Id.* at 351 (1996). Further, the right may be limited by legitimate penological goals, such as maintaining security and preventing fire or sanitation hazards. *See Acord v. Brown*, No. 91-1865, 1992 WL 58975 (6th Cir. March 26, 1992); *Hadix v. Johnson*, No. 86-1701, 1988 WL 24204 (6th Cir. March 17, 1988); *Wagner v. Rees*, No. 85-5637, 1985 WL 14025 (6th Cir. Nov. 8, 1985).

To state a claim, an inmate must show that any shortcomings in the library, litigation tools, or legal assistance caused actual injury in his pursuit of a legal claim. *Lewis*, 518 U.S. at 351; *Talley-Bey*, 168 F.3d at 886; *Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir. 1996); *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996); *Walker v. Mintzes*, 771 F.2d 920, 932 (6th Cir. 1985). An inmate must make a specific claim that he was adversely affected or that the litigation was prejudiced. *Vandiver v. Niemi*, No. 94-1642, 1994 WL 677685, at *1 (6th Cir. Dec. 2, 1994).

Further, in order to state a viable claim for interference with his access to the courts, a plaintiff must demonstrate "actual injury" to pending or contemplated litigation. *Dellis v. Corrections Corp. of America*, 257 F.3d 508, 511 (6th Cir. 2001) (citing *Lewis v. Casey*, 518 U.S. 343, 351 (1996)); *see also Talley-Bey v. Knebl*, 168 F.3d 884, 886 (6th Cir. 1999). The Supreme Court has strictly limited the types of cases for which there may be an actual injury:

> *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

Lewis, 518 U.S. at 355. "Thus, a prisoner's right to access the courts extends to direct appeals, habeas corpus applications, and civil rights claims only." *Thaddeus-X v. Blatter*, 175 F.3d 378, 391 (6th Cir. 1999) (en banc). Moreover, the underlying action must have asserted a non-frivolous claim. *Lewis*, 518 U.S. at 353; *accord Hadix v. Johnson*, 182 F.3d 400, 405 (6th Cir. 1999) (*Lewis* changed actual injury to include requirement that action be non-frivolous).

The Supreme Court squarely has held that "the underlying cause of action is an element that must be described in the complaint, just as much as allegations

must describe the official acts frustrating the litigation." *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (citing *Lewis*, 518 U.S. 353 & n.3). The *Christopher* Court held that, "[l]ike any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant." *Christopher*, 536 U.S. at 416.

Plaintiff alleges that the money orders for the initial partial filing fee in three cases were returned to him because they were made payable to the "State of Michigan" instead of the "30th Circuit Court." (Compl. at 9, 11.) He alleges that Defendant Sweeney, Sackett, Leutzow, Meni, Ansell and McLemore denied his access to the court by their actions related to the return of the money orders to Plaintiff. However, he does allege the nature of the underlying lawsuits or demonstrate that they asserted a non-frivolous legal claim. Additionally, he does not allege any actual injury. He does not claim that his cases were dismissed by the Ingham County Circuit Court.[1] Therefore, Plaintiff has failed to state cognizable claim for denial of access to the courts.

B. Retaliation

Plaintiff alleges that Defendants Sweeney and Sackett retaliated against him for filing flash kites by conducting "an unnecessary, unwarranted informal administrative hearing" to delay the return of the money

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[1] Plaintiff does claim that he received "the summary judgment" in a case filed in this Court, *Coleman v. Bowerman*, No. 2:09-cv-24 (W.D. Mich. 2009). (Compl. at 20.) He appears to be referring to a motion for summary judgment filed by that Defendant in that case on July 30, 2009. The motion is currently pending and the case is still open.

orders to Plaintiff when they knew of the time limitations set by the state court to pay the initial partial filing fee. (Compl. at 21.) Plaintiff also alleges that Defendant Sweeney retaliated against him by conducting an administrative hearing and, after being contacted by Defendant Napel, destroying the money orders.

Retaliation based upon a prisoner's exercise of his or her constitutional rights violates the Constitution. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). In order to set forth a First Amendment retaliation claim, a plaintiff must establish that: (1) he was engaged in protected conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from engaging in that conduct; and (3) the adverse action was motivated, at least in part, by the protected conduct. *Thaddeus-X*, 175 F.3d at 394. Moreover, a plaintiff must be able to prove that the exercise of the protected right was a substantial or motivating factor in the defendant's alleged retaliatory conduct. *See Smith v. Campbell*, 250 F.3d 1032, 1037 (6th Cir. 2001) (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). It is well recognized that "retaliation" is easy to allege and that it can seldom be demonstrated by direct evidence. *See Harbin-Bey v. Rutter*, 420 F.3d 571, 580 (6th Cir. 2005); *Murphy v. Lane*, 833 F.2d 106, 108 (7th Cir. 1987); *Vega v. DeRobertis*, 598 F. Supp. 501, 506 (C.D. Ill. 1984), *aff'd*, 774 F.2d 1167 (7th Cir. 1985).

The filing of grievances is constitutionally-protected conduct for which a prisoner cannot be subjected to retaliation. *Shehee*, 1999 WL 1029294, at *4. However, Plaintiff cannot show that an adverse action motivated by the filing of the grievance was taken against him. He received a hearing after each of the grievances he filed.

Plaintiff simply cannot show that having an Administrative Hearing to address his grievances could deter a prisoner from filing grievances. To the contrary, a hearing provides an opportunity for the prisoner to seek redress. The hearing does not become retaliatory in nature simply because the hearing officer fails to find in favor of the prisoner.

Nor can Plaintiff claim that there was a delay in receiving hearings regarding the flash kites he filed. According to his complaint, Plaintiff filed the first "flash kite" on January 12, 2006 and was interviewed the same day. (Compl. at 23.) Over a week later, Plaintiff filed a second flash kite on January 20, 2006. Five days later Defendant Napel told Plaintiff that he would have a hearing the next day. Plaintiff had a hearing on January 26 and received the hearing report on January 30, 2006. (*Id.* at 13-15.) For all those reasons, Plaintiff fails to state a claim for retaliation.

C. Respondeat Superior

Plaintiff claims that Defendant Leutzow "silently condoned and encouraged" the actions of Defendants Sweeney and Sackett. (Compl. at 22.) He also claims that Defendants Leutzow and Sackett denied his access to the court by denying his appeal of his grievances. (*Id.*) He alleges that Defendants Ansell and McLemore denied his access to the courts by not timely deciding his grievances appeals. (*Id.* at 23.)

Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior or vicarious liability. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009); *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691 (1978); *Everson v. Leis*, 556 F.3d 484, 495 (6th Cir. 2009). A

claimed constitutional violation must be based upon active unconstitutional behavior. *Grinter v. Knight*, 532 F.3d 567, 575 (6th Cir. 2008); *Greene v. Barber*, 310 F.3d 889, 899 (6th Cir. 2002). The acts of one's subordinates are not enough, nor can supervisory liability be based upon the mere failure to act. *Grinter*, 532 F.3d at 575; *Greene*, 310 F.3d at 899; *Summer v. Leis*, 368 F.3d 881, 888 (6th Cir. 2004). Moreover, § 1983 liability may not be imposed simply because a supervisor denied an administrative grievance or failed to act based upon information contained in a grievance. *See Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999). "[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft*, 129 S. Ct. at 1948. Plaintiff's claim that Defendant Leutzow "silently condoned and encouraged" the actions of Defendants Sweeney and Sackett is merely conclusory and is insufficient to demonstrate that Defendant Leutzow engaged in any active unconstitutional behavior. (Compl. at 22.)

Moreover, Defendants Leutzow, Sackett, Ansell and McLemore may not be held liable under § 1983 merely because they denied Plaintiff's grievances or grievance appeals. *Shehee*, 199 F.3d at 300 (defendants could not be held liable for plaintiff's termination from his commissary job when their only roles in the action involved the denial of administrative grievances or the failure to act). Accordingly, Defendants Leutzow, Sackett, Ansell and McLemore must be dismissed.

D. Violation of Policy Directive

Defendants Leutzow, Meni, Ansell and Napel's alleged failure to comply with an administrative rule or policy does not itself rise to the level of a constitutional violation. *Laney v. Farley*, 501 F.3d 577, 581 n.2 (6th

Cir. 2007); *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1992); *Barber v. City of Salem*, 953 F.2d 232, 240 (6th Cir. 1992); *Spruytte v. Walters*, 753 F.2d 498, 508-09 (6th Cir. 1985); *McVeigh v. Bartlett*, No. 94-23347, 1995 WL 236687 at *1 (6th Cir. Apr. 21, 1995) (failure to follow policy directive does not rise to the level of a constitutional violation because policy directive does not create a protectable liberty interest). Section 1983 is addressed to remedying violations of federal law, not state law. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982); *Laney*, 501 F.3d at 580-81.

Moreover, to the extent that Plaintiff's complaint presents claims under state law, this Court declines to exercise jurisdiction. "Where a district court has exercised jurisdiction over a state law claim solely by virtue of supplemental jurisdiction and the federal claims are dismissed prior to trial, the state law claims should be dismissed without reaching their merits." *Coleman v. Huff*, No. 97-1916, 1998 WL 476226, at *1 (6th Cir. Aug. 3, 1998) (citing *Faughender v. City of N. Olmsted, Ohio*, 927 F.2d 909, 917 (6th Cir. 1991)); *see also Landefeld v. Marion Gen. Hosp., Inc.*, 994 F.2d 1178, 1182 (6th Cir. 1993).

CONCLUSION

Having conducted the review now required by the Prison Litigation Reform Act, the Court determines that Plaintiff's action will be dismissed for failure to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and 42 U.S.C. § 1997e(c).

The Court must next decide whether an appeal of this action would be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). For the same reasons that

the Court dismisses the action, the Court discerns no good-faith basis for an appeal. Should Plaintiff appeal this decision, the Court will assess the $455.00 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610-11, unless Plaintiff is barred from proceeding *in forma pauperis*, e.g., by the "three-strikes" rule of § 1915(g). If he is barred, he will be required to pay the $455.00 appellate filing fee in one lump sum.

This is a dismissal as described by 28 U.S.C. § 1915(g).

A Judgment consistent with this Opinion will be entered.

Dated: 10/8/09

/s/ R. Allan Edgar
R. Allan Edgar
United States District Judge

In the United States District Court
For the Western District of Michigan

André Lee Coleman-Bey

(Enter above the full names of all plaintiffs, including prison number, in this action.) 1:10-cv-00354

v.

Janet T. Neff – US District Judge
Ellen S. Carmody – US Magistrate Judge

Aaron J. Vroman & Mary Fate

(Enter above the full name of the defendant or defendants in this action.)

COMPLAINT

I. Previous Lawsuits

CAUTION: The Prison Litigation Reform Act has resulted in substantial changes in the ability of incarcerated individuals to initiate lawsuits in this and other federal courts without prepayment of the required $250 filing fee. Accurate and complete responses are required concerning your litigation history. Generally, a plaintiff's failure to accurately and completely answer the questions set forth below will result in denial of the privilege of proceeding *in forma pauperis* and require you to pay the entire $350 filing fee regardless whether your complaint is dismissed.

A. Have you ever filed a lawsuit while incarcerated or detained in any prison or jail facility? Yes ☒ No ☐

B. If your answer to question A was yes, for each lawsuit you have filed you must answer questions 1 through 5 below. Attach

additional sheets as necessary to answer questions 1 through 5 below with regard to each lawsuit.

1. Indentify the court in which the lawsuit was filed. If it was a state court, identify the county in which the suit was filed. If the lawsuit was filed in federal court, identify the district within which the lawsuit was filed.

   See Attached Pages.

2. Is the action still pending? Yes ☒ No ☒

   a. If your answer was no, state precisely how the action was resolved:

   See Attached Pages.

3. Did you appeal the decision? Yes ☒ No ☐

4. Is the appeal still pending? Yes ☒ No ☒

   a. If not pending, what was the decision on appeal? See Attached Pages

5. Was the previous lawsuit based upon the same or similar facts asserted in this lawsuit? Yes ☐ No ☒

   If so, explain: N/A

II. **Place of Present Confinement:** Marquette Branch Prison in Marquette, MI

If the place of present confinement is not the place you were confined when occurrence that is

subject of instant lawsuit arose, also list the place you were confined: Ionia Maximum Correctional Facility in Marquette, MI

III. **Parties**

A. Plaintiff(s)

Place your name in the first blank and your present address in the second blank. Provide the same information for any additional plaintiffs. Attach extra sheets as necessary.

Name of Plaintiff André Lee Coleman-Bey

Address 1960 US Hwy. 41 South (173324) Marquette Branch Prison Marquette, MI

B. Defendant(s)

Complete the information requested below for each defendant in this action, including whether you are suing each defendant in an official and/or personal capacity. If there are more than four defendants, provide the same information for each additional defendant. Attach extra sheets as necessary.

Name of Defendant #1 Aaron J. Vroman

Position or Title Assistant Resident Unit Assistant (ARUS)

Place of Employment Ionia Maximum Correctional Facility (ICF)

Address 1576 West Bluewater Highway, Ionia, MI 48846

Official and/or personal capacity? Official and Individual Capacity (Both)

Name of Defendant #2 Mary E. Fate

Position or Title Resident Unit Manager (RUM)

Place of Employment Ionia Maximum Correctional Facility (ICF)

Address 1576 West Bluewater Highway, Ionia, MI 48846

Official and/or personal capacity? Official and Individual Capacity (Both)

Name of Defendant #3_____

Position or Title_____

Place of Employment_____

Address_____

Official and/or personal capacity?_____

Name of Defendant #4_____

Position or Title_____

Place of Employment_____

Address_____

Official and/or personal capacity?_____

Name of Defendant #5_____

Position or Title_____

Place of Employment_____

Address_____

Official and/or personal capacity?_____

IV. Statement of Claim

State here as briefly as possible, the facts of your case. Describe how each defendant is personally involved. Include also, the names of other persons involved, dates and places. **Do not give any**

legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheets if necessary.

[See Attached Pages]

V. Relief

State briefly and precisely what you want the court to do for you.

[See Attached Pages]

March 26, 2010, E.D. — **Date**

s/ André Lee Coleman-Bey — **Signature of Plaintiff**

NOTICE TO PLAINTIFF(S)

The failure of a *pro se* litigant to keep the court apprised of an address change may be considered cause for dismissal.

[Attached Pages – Handwritten]

PREVIOUS LITIGATIONS

1) Coleman-Bey vs. Dahlstrom, et al.
Docket No.: 2:05-cv-30, Sixth Circuit No.: 06-1544; and Supreme Court No.: 08-9626 Dismissed.

2) Coleman-Bey vs. Bouchard, et al.
Docket No.: 2:04-cv-268, Sixth Circuit No.: 06-2461 Dismissed. Supreme Court No.: Pending.

3) Coleman-Bey vs. Gerth, et al.
Docket No.: 2:05-cv-158, Sixth Circuit No.: 07-1270 Dismissed.

4) Coleman-Bey vs. Granholm, et al.
Docket No.: 2:06-cv-12485, Sixth Circuit No.: Pending On Appeal.

5) Antonie Harris-cv-Gerth, et al.
Docket No.: 2:08-cv-12374, Pending/Dismissed. Sixth Circuit No.:

6) Coleman-Bey vs. Kinnunen
Docket No.: 2:05-cv-256, Sixth Circuit No.: & No:
Supreme Court No.: Dismissed.

7) Coleman-Bey vs. Bowerman
Docket No.: 2:09-cv-24 Pending.

8) Coleman-Bey vs. Sweeney, et al.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

André Lee Coleman-Bey,

Plaintiff.

Complaint

vs.

Jury Trial Demanded

Aaron J. Vromer, and Mary E. Fate,

Defendant(s).

INTRODUCTION

Preliminary Statement

This is a civil rights action filed by André Lee Coleman-Bey, a state convict, for damages and Injunctive Relief under 42 U.S.C. §§ 1983 and 1985(3). First, alleging Defendant Vromer in temporal proximity of Plaintiff written complaint to Supervisor, Defendant Fate about not making the required legal mail rounds then was instructed to make these required legal mail rounds. When Defendant did make legal mail rounds, Vromer received for processing a series of legal mail. Specifically Plaintiff's Petition for Judicial Review going to the Ingham County Circuit Court – in retaliation disregarded the expedited legal mail for and petition – when Plaintiff inquired to the court only to learn months later the Petition for Judicial Review never arrived – checking with the facilities business office only to learn that

Vromer did not process the single article of legal mail. Defendant Fate answered Step I ICF-06-10-1552 conspiring to cover-up for Vromer, thereby being deliberate indifferent to Plaintiff access to the court, the denial of access to the court prejudiced Plaintiff in pursuing litigation. Second, alleging that Plaintiff presented Defendant Fate with six articles of legal mail going out on expedited legal mail form; Fate tried to walk away without allowing Plaintiff to seal up the legal mail nor provide Plaintiff with the Goldenrod copies. When Plaintiff asked to obtain the receipts and seal up the legal mail that retort was that Plaintiff can get the copies from the officer. When Plaintiff exited for lunch only to find the legal mail sitting unguarded and Fate no place to be found – little did Plaintiff know that this was a 'trap' designed by Fate. After exiting the kitchen and following the officer's instruction; Plaintiff for the second time, was ordered to return to his assigned room – Plaintiff picked up the legal mail returning to his assigned room which resulted in Fate returning demanding the legal mail back. Plaintiff noticed that Fate signed and dated the legal mail forms, Plaintiff sealed all six articles of legal mail, tore off the Goldenrod and gave the rest of the forms and six articles of legal mail to Fate. Plaintiff's Motion for Relief of Judgment-Amendment did not make it to the Western District Court in Docket No.: 2:04-cv-268. That resulted in the dismissal of this action, as a result Plaintiff suffered a second continued litigation related injury in pursuing access to the courts that resulted in prejudice to Plaintiff – further denying Plaintiff access to the courts. As a result of the initiation of grievance ICF-06-10-1607 and ICF-06-10-1608 Fate instructed ARUS Jimmy Waters to initiate a retaliatory transfer request. In all instances both defendants violated Plaintiff's First and

Fourteenth Amendment to the United States Constitution.

Jurisdiction

This court has jurisdiction over the Plaintiff claims of violation of Federal Constitutional Rictions under 42 U.S.C. §§ 1331(a) and 1343.

Venue

The venue is proper in this district because significant acts and/or omissions of the Defendants has occurred in the Southern Division of Michigan, mainly in Ionia, Michigan in Ionia County.

Parties

1. Plaintiff, André Lee Coleman-Bey, is and was at all times relevant to this action, a African-American convict currently confined at the Baraga Maximum Correctional Facility in Baraga, MI. Plaintiff is a U.S. citizen.

2. Defendant, Aaron J. Vromer, is and was at all times relevant to this action, an Assistant Unit Supervisor (ARUS) employeed and working at the Ionia Maximum Correctional Facility in Ionia, MI. Defendant Vroman is a white male.

3. Defendant, Mary E. Fate, is and was at all times relevant to this action, a former Resident Unit Manager (RUM) retired from working at the Ionia Maximum Correctional Facility in Ionid, MI. Defendant Fate is a white female.

4. Defendants were acting under color of state law and is sued in their individual capacity (for compensatory and punitive damages) and official capacity (for prospective relief).

STATEMENT OF FACTS

5. In early 2006 months prior to Plaintiff Coleman-Bey's arriving to Ionia Maximum Correctional Facility (ICF) a white prisoner Gregory A. Figel was housed at ICF, specifically in 3 unit where Defendant Vroman was working and was derelict in his duty and responsibility in making daily legal mail rounds in 3 unit.

6. These business day legal mail rounds entails a 10 minute warning over the public address system proceeding these legal mail rounds. Instead of following the department's operational procedure, Defendant Vromer falsified 3 unit log book as rounds had been made, but actually no rounds was ever made. Figel, not only had to file more than one "flash-kite," but administrative grievances simply to get his legal mail out, and to receive legal supplies to facilitate access to the courts. Because Figel is white he was rewarded with a sooner than average move to 5 unit by Defendant Vromer. Said defendant went back to his shiftless work habits.

7. On July 5, 2006 Plaintiff arrived to ICF from AMF[1] and housed in the transition unit (3 Unit) where Defendant Vromer was assigned as ARUS. Plaintiff had several pending litigation (i.e., Coleman-Bey vs. Bouchard, et al., #2:04-cv-286; Coleman-Bey vs. Kinnunen, #2:05-cv-258; Coleman-Bey vs. Gerth, et al., #2:05-cv-158; Coleman-Bey vs. Granholm, et al., #2:04-cv-12485; and Coleman-Bey vs. Dahlstrom, et al., and a host of State Court actions). (Ex #1 [Transfer Order Fr: AMF To: ICF]).

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[1] AMF: Baraga Maximum Correctional Facility in Baraga, MI.

8. Defendant Vromer was to meet and discuss with Plaintiff the available programs, work assignment and expected behavior of Plaintiff while at ICF and go over a program classification report – instead Defendant Vromer shiftless work habits only half assed completed a program classification report, never meeting with Plaintiff, but only sending the classification report in mail, completing the emergency contact information nor signing or offering Plaintiff the opportunity to sign as part of the classification process (EX #2 [Program Classification Report]).

9. Between July 7, 2006 to July 14, 2006 every business day Plaintiff asked the Resident Unit Officers (RUOs) when kites to Defendant Vromer did not make legal mail rounds by noon to contact the RUM, ARUS or Case Managers trying to get out legal mail, but only to learn that Defendant Vromer was a standing joke surrounding the shiftless work habits in 3 unit.

10. On July 14, 2006 Plaintiff put another kite under Defendant Vromer office door requesting notary and once again advising the Defendant the need to send of legal mail, and that Plaintiff would be out the morning due to an excessive legal property hearing.

11. When Plaintiff returned that afternoon RUM Ronald Embry was on the other side of the wing making a round – Plaintiff gained RUM Embry's attention explaining that Plaintiff just returned to the unit and had out-going expedited legal mail. Said RUM Embry refused to back track saying "I already been on that side, sir!"

12. On July 17, 2006 Plaintiff sent a kite to Defendant Fate after speaking with her briefly on the walk way and put another kite under Defendant Vromer office

door. (Ex #3 [7/17/06 Letter to RUM Fate, re: Legal Concerns]).

13. On July 18, 2006 Plaintiff mailed off two administrative grievances on Defendant Vromer re: (1) notary service; and (2) legal mail rounds.

14. On July 18, 2006 morning at approximately 9:10 am an agitated Defendant Vromer made legal mail rounds. Plaintiff processed five articles of legal mail with Defendant Vromer going out on expedited legal mail. One of the articles of legal mail contained a Petition for Judicial Review of a denied request for Rehearing.[2] Plaintiff received all five Goldenrod copies. (Ex #4 [Expedited Legal Mail –Clerk of the Court, 30th Judicial Circuit Court, Lansing, MI]).

15. The grievances on Defendant Vromer (i.e., notary & legal mail rounds) was assigned to Defendant Fate, but like co-defendant Vromer – Defendant Fate did not adhered to the department's rules either, Plaintiff appealed Step I grievance to Step II without interview nor extension for grievance ICF-06-07-988-17I.

16. On August 19, 2006 Plaintiff was interviewed by Defendant Fate on Step I grievance ICF-06-07-988. That was just filed at Step II August 17, 2006 and was ensured that legal mail rounds would be customary announced 10 minutes and advance and all legal mail rounds would be made daily by Defendant Vromer. Plaintiff agreed and signed off at Step I. (Ex #5 [Step I Grievance ICF-06-07-988]).

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[2] Plaintiff rec'd a threatening behavior 9/8/05 and found guilty 9/22/05, filed a timely request for Rehearing that was denied 7/12/06 and mailed to the Ingham County Clerk 7/18/06 by A. Vromer.

17. This agreement was short lived as Defendant Vromer simply failed or refused make any legal mail rounds, despite the written agreement with Defendant Fate Plaintiff appealed to Step III (Ex #6 [Step II and III with Memo from Step II of ICF-06-07-988]).

18. By the end of August 2006 Plaintiff had not received the initial partial filing fee payment from the Ingham County Circuit Court in connection with the Petition for Judicial Review of the denied request for Rehearing of July 12, 2006. Plaintiff wrote to Court Clerk Mike Barron, with no response.

19. In later August 2006 family friend Nancy Gehringer called the Ingham County Circuit Court speaking with the Clerk's office. Only to learn that a search would be conducted. A week later Gehring received a call from the Clerk's office informing her that no Petition for Judicial Review had been received in that time period with the information provided by her.

20. On September 18, 2006 Plaintiff wrote Accounting Tech Debbie Beltz for a Canary copy of the July 18, 2006 expedited legal mail form addressed to the Clerk of the Court, attaching a copy of the Goldenrod copy. Beltz answered the next day saying "I never received the paper work to process through your account." (Ex #7 [7/18/06 Expedited CSJ-318 Form], and Ex #8 [9/19/06 Beltz Kite Response]).

21. On September 21, 2006 Plaintiff initiated a "flash kite" to Deputy Warden Nannett Norwood with a photocopy of the expedited legal mail form explaining the Plaintiff only had 60 days to file a Petition for Judicial Review in the Circuit Court from the denial of the request for Rehearing. See MCL 24.301 and MCR 7.105.

22. On September 25, 2006 Plaintiff received a copy of the September 2006 Level V warden form minutes in which Plaintiff had Prisoner Representative Terry Brewer-El of 3 unit re: question #10. Legal mail rounds – unit 3: (Ex #9 [9/9/2006 ICF Warden's Forum Minutes]).

23. On September 26, 2006 Plaintiff received a response to the "flash kite" to Deputy Warden Norwood, with no resolution. (Ex #10 [9/26/06 Flash Kite Response]).

24. On September 26, 2006 upon receipt of the "flash kite" Plaintiff initiated a Step I grievance against Defendant Vromer. Step I ICF-06-10-1552 was assigned to Defendant Fate.

25. On October 4, 2006 Defendant Fate was summon to make legal mail rounds because no legal mail rounds had been made. Plaintiff presented Defendant Fate with four article of legal mail going out to the courts, Attorney General and two prisoner co-plaintiffs. Each article of legal mail was present open for inspection and with their individual completed legal mail form.

26. Instead of Defendant Fate inspecting the legal mail after Plaintiff signed the CSJ-318 forms for 10/4/06 and at 10:46 am the Defendant grabbed up all the legal mail with the forms, closing Plaintiffs food slot and started to walk away – Plaintiff had to call the Defendant asking to seal up the legal mail and to receive a receipt of the Goldenrod of the expedited legal mail forms.

27. Defendant Fate retort was "You'll get your copy of the receipt from the officer – I'll leave it at the desk." Again proceeded to walk off – again Plaintiff ask to 'seal-up' the legal mail or if the Defendant wanted to verify the co-plaintiff's legal mail – once again the Defendant

only repeated that Plaintiff can "get your receipts from the officer . . ."

28. Defendant Fate knew or should have known that Plaintiff was to present the legal mail unsealed, verified by the Defendant, Plaintiff sign the CSJ-318 form, date and time then the Defendant sign, date and time – the allow Plaintiff to seal the mail – then provide Plaintiff with a Goldenrod copy of the CSJ-318 expedited form. (Ex #11 [OP-CFA-05.03.118 Legal Mail]).

29. Plaintiff exited for lunch – upon entering 4 unit in unit kitchen there was a stack of legal mail at the officer station – there was no staff in the commons area. Plaintiff went into the kitchen and had lunch.

30. Upon exiting the kitchen Defendant Fate was no where around. Plaintiff asked about the whereabouts of this Defendant, but Correction Officer Amy Scott did not know where this Defendant was or why the legal mail was just sitting there unguarded. Plaintiff picked up his VRMs legal mail, the Officer Scott instructed Plaintiff to "stay right here until she (Fate) gets back . . " Plaintiff did as instructed.

31. Plaintiff stood by the A-wing drinking fountain as instructed, a minute or less Supervisor Gail Wright came out of the kitchen without asking what was what and said to Plaintiff "Coleman, I'm giving you a direct order to go lock up!" Supervisor Wright was informed that Plaintiff was instructed to stay there and why.

32. Less than a minute later Correction Officer Larry Lidney came out of the kitchen (who had heard the previous exchange) and said to Plaintiff "Go lock up now – get to your door!" Plaintiff seeing that this was a trap turned and proceed to the assigned room. At this point Defendant Fate stepped out of the bathroom – who had

heard the whole exchange from the time came out of the kitchen – Plaintiff just kept walking towards his room when Defendant Fate said "if you don't bring back that paper work down here your getting a ticket!" This was the third separate order in less than a two minute span, but Plaintiff proceeded to his assigned room.

33. Defendant Fate came to Plaintiff assigned room demanding the legal mail back "or else . . ." The white male guard was standing at the side of the door also trien to intimidate Plaintiff with threats of a 'ticket.' Plaintiff inspected all the legal mail and notice that Defendant Fate had signed, dated and filled in the time. Plaintiff sealed all the legal mail and tore off the Goldenrod copies and gave the six articles to Defendant Fate for processing (Ex #12 [Expedited Legal Mail To: Clerk of the Court], Ex #13 [Expedited Legal Mail To: U.S. Supreme Court], and Ex #14 [Expedited Legal Mail To: Julie Bell])

34. On October 5, 2006 Plaintiff initiated two grievances against Defendant Fate for the method of not processing the legal mail correctly pursuant to operational procedure (1608), and Defendant Fate, Supervisor Wright, and Officer Lindey for prohibited reprisal trap (1607). Plaintiff also initiated a "flash kite" to Deputy Norwood (Ex #15 [10/5/06 Flash]).

35. On October 17, 2006 Plaintiff was called out to ARUS Waters office for interview on Step I grievance ICF-06-10-1552 against Defendant Vromer. The response was already scribbled in by Defendant Fate stating:

> "You had 4 expedited legal mail items logged as being sent out 7-18-06 and 4 on 7-19-06. One did not have a case # on it

> and we cannot determine if the item in question as sent. You also sent a flash kite to the Deputy on 9-25-06 with the same request and answer. Grievance Denied."

(Ex #16 [Step I Response ICF-06-10-1552]).

36. ARUS Waters could not answer any of Plaintiff question beyond informing the Plaintiff that "RUM Fate wanted me to interview you on this grievance after she answer it . " Clearly Defendant Fate investigated and learned of the article of missing legal mail going to the 30th Judicial Circuit Court that contain the Petition for Judicial Review of the denied request for Rehearing.

37. Defendant Fate wrote in a response, delegated the grievance interview to cover up and conspire with Defendant Vromer the retaliatory interferes of the outgoing articles of legal mail. Defendant Fate was was deliberate indifferent to Plaintiff's Freedom of Speech and access to the courts. Defendant Fate instructed ARUS Waters to complete a security classification screen to make sure Plaintiff is "properly housed." But this was a ruse as a security classification screen is used to initiate a transfer when not done as part of a yearly annual screen.

38. On October 23, 2006 Plaintiff appealed ICF-06-10-1552 to Step II pointing out that Defendant Fate intentionally delegated the Step I response after writing in response and becoming the reviewer of her own response – to further cover up for the retaliation and intentional theft by Defendant Vromer of the out going legal mail – further pointing out that Plaintiff had sixty days to file a Request for Rehearing of the denied Request for Rehearing of July 12, 2006. (See Step II 1552).

39. On November 3, 2006 just after four short months Plaintiff was transferred to the Standish Maximum Correctional Facility (SMF) in Standish, MI. This unexpected transfer was only a ruse to down play the retaliation of the transfer itself, as SMF was only a "jumping port" to send Plaintiff back to the Upper Region Disciplinary Facilities for Plaintiff use of the administrative grievance process. (Ex #17 [Transfer Order Fr: ICF To: SMF]).

40. On November 19, 2006 Plaintiff received Step II ICF-06-10-1552 in which Warden Willie Smith verified that "It is evident that your mail was not delivered to the business office for processing but mistakenly did not have this particular piece of expedited legal mail processed as requested by you." (Ex #18 [Step II Appeal ICF-06-10-1552], and Ex #19 [Memo Response of Step II]).

41. On or about November 30, 2006 Plaintiff received Step II ICF-06-10-1607 in which respondent H. Gilken stated in response:

> "After reviewing and investigating this grievance, RUM Fate states that prisoner's mail legal mail is picked up daily in unit 4." She states that prisoner did receive a Goldenrod copy for his legal mail and he was allowed to seal his mail." (Emphasis Added).

42. The Respondent Gilkey did not address the "trap" Defendant Fate designed for Plaintiff simply because Plaintiff exercised his constitutional right to petition the government for redress of grievances. (Ex #19 [Step I ICF-06-10-1607], and Ex #20 [Memo Response

of Step I]). Plaintiff was transferred-retailatorily-before interview.

43. On December 5, 2006 Plaintiff was expectedly transferred to the Marquette Branch Prison in Marquette, MI (MBP) to facilitate Plaintiffs need for a therapeutic diet. Defendant Fate knew of this and used SMF as a 'Jumping Port' instead of sending Plaintiff back a few hundred miles to ICF Plaintiff was sent by design 700 plus miles to MBP to further Defendant Fate's retaliatory design.

44. Plaintiff has been on a medically order diet since 2000 for Meniere's disease. Pursuant to Defendants Vromer and Fate policy directive PD-03.04.100 "Health Services." ICF medical staff was to complete a health care service grid prior to transfer to ensure that Plaintiff's medical needs can be met at the receiving facility.

45. Defendants Vromer and Fate policy directive PD-05.01.140 "Prisoners Placement and Transfer" the ICF Health Management Information System is to be up-dated prior to Plaintiffs transfer. Combined PD-03.04.100 and PD-05.01.140 is in place to prevent such retaliatory transfer done by design. Defendant Fate was able to by pass the policies and procedure in place and retaliatory transfer Plaintiff to SMF knowingly knowing Plaintiff's medical concerns could not be met. Hence, Plaintiff would have to be transferred again (Ex #21 [PD-03.04.110], and Ex #22 [PD-05.01.140]).

46. On November 30, 2006 Plaintiff appealed ICF-06-10-1552 to Step III explaining Step II was not provided until November 19, 2006 to Plaintiff while at SMF. Plaintiff attached a photocopy of the July 18, 2006 legal photocopy form that Defendant Vromer signed and

Plaintiff signed going to the 30th Judicial Circuit Court in Lansing, MI.

47. That the Request for Rehearing was denied July 12, 2006 from the guilty findings of the threatening behaving hearing of September 22, 2005 that Plaintiff received August 8, 2006 and from this Rehearing denial date Plaintiff had 60 days to file the Petition for Judicial Review. That said Defendant Vromer took retaliatory action within days of Plaintiff filing a grievance, flash kite, making a verbal then July 17, 2006 written complaint to Defendant Fate.

48. That due to no fault of Plaintiffs own, but intentional retaliatory act of Defendant Vromer Plaintiff missed this court date when the Petition for Judicial Review and envelope was intentionally not processed. (Ex #23 [Step III Reason for Appeal ICF-06-10-1552]).

47. Defendant Fate made it a point to communicate to SMF RUM and ARUS in the transition unit that Plaintiff is a "Grievance Writer" and a "Litigator" with need for a "Therapeutic Diet." This Defendant knew or should have known that these retaliatory comments would ensure that inmate would be sent to the Upper Region Maximum Disciplinary Facilities. (Ex 24 [Transfer Order Fr: SMF To: MBP]).

48. On December 12, 2006 Plaintiff appealed to Step II ICF-06-10-1607 pointing out that Defendant Fate did not mail out the request for instructions to the United States Supreme Court in Coleman-Bey vs. Kinnen. Did not mail to the Federal Court Clerk nor to the Assistant Attorney General Julia R. Bell Plaintiffs Amended Motion for Relief from Judgment in Coleman-Bey vs. Bouchard, et al. that resulted in the dismissal of this action.

49. That Defendant Fate designed a 'Trap' using Supervisor G. Wright and Officer L. Lindey as part of her retaliatory act, then within temporal proximity of Plaintiff processing grievances ICF-06-10-1607 and ICF-06-10-1608 Defendant Fate ordered ARUS Waters to complete a security classification screen under the ruse of evaluating Plaintiffs confinement level, but actually triggering a retaliatory transfer for Plaintiffs use of the administrative grievance process.

50. Then contacting SMF's RUM/ARUS to further Defendant Fates design to move Plaintiff to the Upper Regional Facilities labeled Plaintiff as a "Grievance Writer" and a "Litigator." Notify SMF that Plaintiff had "Therapeutic Diet Needs" that generated a second transfer to MBP.

51. While at MBP Plaintiff received Step I ICF-06-10-1608 that was answered by Respondent B. Haynie. This response is contrary to 1609, Haynie stated in the response in relevant part:

> "Investigation of . . . complaint reveals that he had several legal documents that he wanted to send out on 10/4/06, and he had asked RUM Fate to sign the forms. Fate stated that when she received the forms from Coleman she notice that he had not signed the forms yet. She went ahead and signed the forms first, and then asked Coleman to sign them Coleman was called for chow at the same time and he did not want to sign them at that time. Fate then explained to him that it would only take a second for him to sign the forms, at which time she would process them. Fate stated that Coleman be-

> came argumentative and said: "I'll give them to Waters tomorrow." According to Fate. "Coleman refused to sign the forms at that time, so she confiscated the forms as she had already signed them and he had not. She denies taking any of his actual documents, but admits that she did take the CSJ-318 forms." Upon reviewing the "legal mail and court filing fee log book" in the mail room, I observed that ARUS Waters did in fact process 6 CSJ-318 forms for. .Coleman, which would support. "Fate's claim that she never took his legal documents as. . .Coleman has alleged." (Emphasis Added).

52. RUM Haynie response is contrary to Step I ICF-06-10-1607 by RUM Gilkey that Defendant Fate did provide Plaintiff with a goldenrod copy for Plaintiff's legal mail and Plaintiff was allowed to seal the mail (Ex #25 [Step I, ICF-06-10-1608] and Ex #26 [Memo Response of Step I]).

53. On December 29, 2006 Plaintiff appealed ICF-06-10-1608 to Step II pointing out that Defendant Fate presented sign in the Defendants presence expedited legal mail forms as required by OP-CFA-05.03.118, that Defendant Fate took the legal mail and closed Plaintiffs food slot and started to walk away – Plaintiff called this defendant back asking to seal the legal mail and to obtain the Goldenrod copies.

54. The Defendant retorted "You'll get your copy of the receipt from the Officer – I'll leave it at the desk." Again walking off – again Plaintiff had to ask to seal the legal mail up and if the Defendant wanted to verify the

co-plaintiff, once again Defendant Fate said "Get your receipt from the desk."

55. On January 11, 2007 Plaintiff received the final decision of Step III of ICF-06-07-988 on Defendant Vromers refusal to conduct legal mail rounds.

56. On January 17, 2007 Warden Smith answered Step II ICF-06-10-1607 basically mirroring Step I that Plaintiff was provided with a copy of the Goldenrods of the expedited legal mail forms and allowed to seal his legal mail.

57. On February 14, 2007 Warden Smith answered Step II ICF-06-10-1608 again basically stating that Step I response concluding "RUM Fate confiscated the forms as she already signed them and he had not – she (Fate) denies taking any of his actual documents, but admits that she did take the CSJ-318 forms (Expedited Legal Mail Forms). Ending "Fat's" claim that she never took his legal documents."

58. On February 20, 2007 Plaintiff appealed to Step III in ICF-06-10-1607 repeating Step I and II attaching the unaccounted for legal mail.

59. On February 21, 2007 Plaintiff received back Step III ICF-06-10-1557 concluding that "this grievance appeal is considered partially resolved." (Ex #27 [Step III]).

60. On February 26, 2007 Plaintiff appealed to Step III in ICF-06-10-1608 again repeating Step I and II documenting that Defendant Fate cost Plaintiff the missed opportunity to appeal to the United States Supplemental Court in Coleman-Bey vs. Kinnunen, and the dismissal of Coleman-Bey vs. Bouchard because the Amended Motion for Relief of Judgment never arrived to the courts nor Attorney General Office.

61. On April 19, 2007 Plaintiff received the final Step III decision from the Central Office. (Ex #28 [Step III]).

62. On April 20, 2007 Plaintiff received the final Step III decision from the Central Office. (Ex #29 [Step III]).

63. The statutory time limitations in MCL 600.5805(8) was tolled until Plaintiff exhausted the required and available administrative grievance avenues pursuant to 42 U.S.C. § 1997e(a).

Claim #1

That Defendant Vromer intentionally and in retaliation of Plaintiff written and verbal complaint of this Defendant's shiftless work habits destroyed Plaintiff's Petition for Judicial Review of the denied Request for Rehearing causing a litigation related injury that prejudiced Plaintiff in pursuing a litigation in violation of the Freedom of Speech in violation of the First Amendment to the United States Constitution and Fourteenth Amendment of the United States Constitution.

Claim #2

That Defendant Fate, in responding to the grievance of Defendant Vromer conspired to cover up the theft of Plaintiffs out going legal mail with Defendant Vromer. Scribbling in the Step I response, delegating the interview to ARUS Waters after being instructed by Defendant Fate to evaluate Plaintiff placement from appropriateness in completing a security classification screen knowingly knowing that this would trigger a transfer. Defendant Fate then reviewed her own Step I response. Defendant Fate knew or should have known that this conspiracy was prohibited in violation of Plaintiffs First Amendment to the First Amendment to the United

States Constitution and the Fourteenth Amendment of the United States Constitution.

Claim #3

That Defendant Fate after being exposed for the conspiracy in Plaintiffs Step II appeal against Defendant Vromer was required to make legal mail rounds in the absence of ARUS Waters refused to allow Plaintiff to seal up the out-going legal mail, receive a copy of the Goldenrod copies of the expedited legal mail forms, but walked away with Plaintiffs legal mail, designed a 'trap' for Plaintiff, in retaliation, and within temporal proximity of the Step II appeal. Defendant Fate intentionally did not mail out three articles of legal mail causing Plaintiff a litigation related injury in two civil actions, missing the opportunity to appeal to the United States Supreme Court, and Amending the Motion for Relief of Judgment in another that was dismissed in violation of Plaintiffs First Amendment to the United States Constitution and to the Fourteenth Amendment of the United States Constitution.

Claim #4

That Defendant Fate, after Plaintiff grieved the retaliation and delay of outgoing legal mail and designed trap somehow by-passed the policies and procedures in place to ensure Plaintiff is <u>not</u> transferred to a facility that can not handle Plaintiffs medical needs. Plaintiff was then transferred weeks later in retaliation for filing two grievances on Defendant Fate only months later from arriving to ICF. Then Defendant Fate contacted SMF, and in retaliation labeled Plaintiff as a "Grievance Writer" and "Litigator" then notified SMF of Plaintiffs need for a therapeutic diet to further achieve the design to ensure Plaintiff is not transferred back to ICF in vio-

lation of Plaintiffs First Amendment of the United States Constitution, and Fourteenth Amendment of the United States Constitution.

Relief Requested

Wherefore, Plaintiff requests that the Court grant the following relief:

1. Order that the Defendant modify OP-CFA-05.63.118 that require announcements be made in general population of legal mail rounds and cease/desist the practice that general population prisoners be required to "kite" to get legal mail out;

2. Order that the department, as soon as practical transfer Plaintiff back to ICF general population. Make available the assaulted offender program and all programs/therapy to facilitate a future parole;

3. Order that the department, as soon as practical, make available to treat Plaintiff's Meniere's disease and Hyperlipidmia a 2,000 Gram Sodium, minimum 2,900 Caloric daily, vegetarian, healthy options, with maximum 4,700 Potassium diet;

3. That Defendant Vromer be required to pay Plaintiff $10,000 in compensatory damages for the retaliatory act of intentionally not process Plaintiff's July 18, 2006 legal mail; and $20,000 in compensatory damages for causing the litigated related injury;

4. That Defendant Vromer be required to pay Plaintiff punitive damages that this court deems just and proper;

5. That Defendant Fate be required to pay Plaintiff $5,000 in compensatory damages for conspiring to cover up Defendant Vromers retaliatory act and theft of outgoing legal mail;

6. That Defendant Fate be required to pay Plaintiff $20,000 in compensatory damages for the theft of Plaintiffs outgoing legal mail, $40,000 in compensatory damages for each litigated related injury (Kinnunen action, and Bouchard action), and $5,000 for the retaliatory transfer to SMF, and purporting the second transfer to MBP;

7. That Defendant Fate be required to pay Plaintiff punitive damages that this court deems just and proper;

8. Any other relief as this court deems proper and just that this court is entitled Plaintiff to.

Respectfully submitted,

André Lee Coleman-Bey
Plaintiff, in pro se

March 26, 2010, E.D.

In the United States District Court
For the Western District of Michigan

André Lee Coleman-Bey,

(Enter above the full names of all plaintiffs, including prison number, in this action.)

2:10-cv-322

v.

R. Allan Edgar, US District Judge
Timothy P. Greeley, US Magistrate Judge

Bertina M. Bowerman, Kimberly Hill, and Mary Boneville,

(Enter above the full name of the defendant or defendants in this action.)

COMPLAINT

I. Previous Lawsuits

CAUTION: The Prison Litigation Reform Act has resulted in substantial changes in the ability of incarcerated individuals to initiate lawsuits in this and other federal courts without prepayment of the required $350 filing fee. Accurate and complete responses are required concerning your litigation history. Generally, a plaintiff's failure to accurately and completely answer the questions set forth below will result in denial of the privilege of proceeding *in forma pauperis* and require you to pay the entire $350 filing fee regardless whether your complaint is dismissed.

A. Have you ever filed a lawsuit while incarcerated or detained in any prison or jail facility? Yes ☒ No ☐

B. If your answer to question A was yes, for each lawsuit you have filed you must an-

swer questions 1 through 5 below. Attach additional sheets as necessary to answer questions 1 through 5 below with regard to each lawsuit.

1. Identify the court in which the lawsuit was filed. If it was a state court, identify the county in which the suit was filed. If the lawsuit was filed in federal court, identify the district within which the lawsuit was filed.

   See Attached.

2. Is the action still pending?

   Yes ☒ No ☒

   a. If your answer was no, state precisely how the action was resolved: See Attached.

3. Did you appeal the decision?

   Yes ☒ No ☐

4. Is the appeal still pending?

   Yes ☒ No ☒

   a. If not pending, what was the decision on appeal? See Attached.

5. Was the previous lawsuit based upon the same or similar facts asserted in this lawsuit? Yes ☒ No ☐

   If so, explain: Retaliation by Bowerman false misconduct in Coleman-Bey vs. Bowerman, Docket No.: 2:09-cv-24

II. **Place of Present Confinement:** Baraga Correctional Facility in Baraga, MI

If the place of present confinement is not the place you were confined when occurrence that is subject of instant lawsuit arose, also list the place you were confined: Alger Correctional Facility in Munising, MI

III. **Parties**

In item A below, place your name in the first blank and your present address in the second blank. Do the same for additional plaintiffs, if any.

A. Name of Plaintiff André Lee Coleman-Bey

Address 13924 Wadaga Rd., Munising, MI 49908-9204 #173324

In item B below, place the full name of the defendant in the first blank, his or her official position in the second blank and his or her place of employment in the third blank. Use item C for the names, positions and place of employment of all additional defendants. Attach extra sheets as necessary. **State whether you are suing each defendant in an official or personal capacity.**

B. Defendant Bertina M. Bowerman is employed as Correctional Officer at Alger Correctional Facility PO Box 600, Munising, MI 49908-0600

C. Additional Defendants

Kimberly Hill, Correctional Officer

(Same Address)

Mary Boneville, Hearing Investigator

(Same Address)

IV. **Statement of Claim**

State here as briefly as possible, the facts of your case. Describe how each defendant is personally involved. Include also, the names of other persons involved, dates and places. **Do not give any legal arguments or cite any cases or statutes.** If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheets if necessary.

[See Attached Pages]

V. **Relief**

State briefly and precisely what you want the court to do for you.

[See Attached Pages]

October 29, 2010, E.D. — **Date**

s/ André Lee Coleman-Bey — **Signature of Plaintiff**

NOTICE TO PLAINTIFF(S)

The failure of a *pro se* litigant to keep the court apprised of an address change may be considered cause for dismissal.

[Attached Pages – Handwritten]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

André Lee Coleman-Bey,

Plaintiff.

vs.

Bertina M. Bowerman, et al.

Defendants.

Prior Actions:

1. Coleman-Bey vs. Dahlstrom, et al. Sixth Circuit Appealed District Ct. – Western/Federal – Northern Division – Resolved/Dismissed.

2. Coleman-Bey vs. Gerth, et al.
District Ct. – Western/Federal – Northern Division – Resolved/Dismissed.

3. Coleman-Bey vs. Kinnunen Sixth Circuit/U.S. Supreme Ct. District Ct. – Western/Federal – Northern Division – Resolved/Dismissed.

4. Coleman-Bey vs. Bowerman
District Ct. – Western/Federal – Northern Division – Pending.

4. Coleman-Bey vs. Vroman, et al.
District Ct. – Southern/Federal – Pending

5. Coleman-Bey vs. Trieweiler
District Ct. – Western/Federal – Northern – Pending in U.S. Supreme Ct.

6. Coleman-Bey vs. Granholm, et al.
District Ct. – Eastern/Federal – Pending on Appeal

7. Coleman-Bey vs. Tollefson
District Ct. – Southern/Federal – Just Filed

8. Harris-vs.-Gerth, et al.
District Ct. – Southern/Federal – Pending on Appeal

Exhaustion of Grievance Process:

This action surrounds a major misconducts. Misconducts are not grievable.

*9. Coleman-Bey vs. Sweeney, et al.
District Ct. – Western/Federal – Pending on Appeal

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

André Lee Coleman-Bey,

Plaintiff,

Complaint

vs.

Jury Trial Demanded

Bertina M. Bowerman, Kimberly Hill, and Mary Boneville.

Defendants.

INTRODUCTION

Orwellen, Alger Maximum (LMF) is a race conscious facilitious society created by the Michigan Department of Corrections (MDOC) that is nothing more than modern day slavery and human warehousing. This race conscious society African-American males such as Plaintiff, are discouraged and dissuaded from questioning European staff in any shape, fashion or form. When Aftrican-Americans, such as Plaintiff question staff the Orwellian race conscious factitious society becomes inhospitable, combative and this is from racial animus.

In this factitious society of staff approved modern day slavery reverts back to the era of lynching from 1882 through 1988; in which nearly 3,500 African-Americans were lynched in America: Many victims of lynch mobs were hanged on the word of a European woman who

claimed to have been sexually assaulted by a African-American male – such as Plaintiff.

Here, a European female, still not only stinging from the reprimanded caused by Plaintiff – an African-American male, but the disciplinary action that resulted in suspension 'without pay,' with the authority and the weight of the State of Michigan behind her stated in retaliation in temporal proximity of the suspension:

> "I went to prisoner Coleman cell and asked him if he had the books. He then stated, "Yes I have the law books I took from Cedar because they wouldn't give me a receipt. I knew I was suppose to leave them there. It's not like I haven't been to segregation and back before."

Defendant Bowerman, has openly and documentally accused with intentionally falsehood Plaintiff of sexual misconduct (verbal comment), disobeying a direct order (just talking), insolence (calling her a bitch), insolence (calling her a bitch), disobeying a direct order (looking into the food tray), and disobeying a direct order (not fixing an unbroken door card) all of which is sanctioned by the Orwellen race conscious sanctum of LMF.

In 1900, Senator Benjamin Tillman of South Carolina gave a speeh on the Senate floor in which he defendanded the widespread lynching of African-American males stating:

> "We of the South have never recognized the right of the Negro to govern white men and we never will," he said. "We have never believed him to be equal to the white man, and we will not submit to his gratify-

> ing his lust on our wives and daughters without lynching him."

As journalist Ida B. Wells-Barnett wrote more than a century ago, "Often were the victims of concocted charges to" "excuse some of the most heinous crimes that ever stained the history of a country.'

Lynching of African-Americans were widely accepted in this country. Such crimes were sometimes preceded by newspaper announcements of the coming event, which took on the look of a freak show that was attended by European men, women and children. Sometimes, the images of the lifeless bodies of African-American men dangling from trees, bridges or telephone poles turned into post cards souvenirs.

Preliminary statement

This is a civil rights action filed by André Lee Coleman-Bey, a state convict for damages and Injunctive Relief under 42 U.S.C. §§ 1983, 1985(3). Alleging retaliatory false major misconduct in temporal proximity of Plaintiff exercising his constitutional right to access to the courts as required by 42 U.S.C. § 1997e(a) through exhaustion of the prison grievance process; in this instance resulted in not only reprimanding but later in a second grievance, disciplinary action that resulted disciplinary that resulted in Defendant Bowerman, being suspended without pay. In violation of the First Amendment of the United States Constitution, and the Fourteenth Amendment of the United States Constitution, with the agreement and support of co-defendant Hill, who also too was subject of a favorable administrative grievance conspired with co-defendant Bowerman to create an retaliatory false major misconduct in violation of the First Amendment of the United States Constitu-

tion, and the Fourteenth Amendment of the United States Constitution. When Plaintiff sat out to defend against the retaliatory false misconduct that was concocted Defendant Boneville, conducting the investigation reviewed the video which showed that Defendant Bowerman never received the law books from Plaintiff – as Plaintiff turned them in upon entering Spruce unit hours before Defendant Bowerman arrived – the security video would have refuted the photo as evidence submitted by Defendant Bowerman. In doing so would have documented by security video the concoction of the misconduct, and the agreement with co-defendant Hill. Co-defendant Boneville, intentional refused to obtain the exculpatory evidence that was not only on the face of the major misconduct but also in a written statement received by Defendant Boneville with ample time, but instead after reviewing the master video refused to obtain the security video in violation of the Fourteenth Amendment of the United States Constitution.

Jurisdiction

This honorable court has subject matter jurisdiction over the Plaintiffs claims of violation of Federal Constitutional Right under 42 U.S.C. §§ 1331(a), and 1343.

Venue

The venue is proper in this district because significant acts of the Defendant has occurred in the Northern District of Michigan, mainly in Munising County located in the Upper Michigan region.

Parties

1. Plaintiff, André Lee Coleman-Bey, is and was at all times relevant to this action, is a African-American male convict confined at the Baraga Correctional Facili-

ty (formerly of the Alger Correctional Facility in Munising, MI) in Baraga, MI. Plaintiff is a U.S. citizen.

2. Defendant, Bertina M. Bowerman, is and was at all times relevant to this action, a Correction Office employeed and working at the Alger Correctional Facility in Munising, MI. Defendant Bowerman is a European lesbian female that openly boast of hating males, and a U.S. citizen.

3. Defendant, Kimberly Hill, is and was at all times relevant to this action, a Correction Officer employeed and working at the Alger Correctional Facility in Munising, MI. Defendant Hill, is a European male, and a U.S. citizen.

4. Defendant, Mary Boneville, is and was at all times relevant to this action, a Hearing Investigator employeed and working at the Alger Correctional Facility in Munising, MI. Defendant Boneville, has a history of calling African-American prisoners "ass-holes" while locked in their room or in the presence of a group of European male staff – this cowardly act is acceptable, and a U.S. citizen.

5. All Defendants were acting under color of state law and is sued in their individual capacity (for compensatory and punitive damages), and official capacity (for prospective injunctive relief).

STATEMENT OF FACTS

6. The MDOC Policy Directive PD-01.04.110 "Administrative Rules, Policies and Procedures" Provides in relevant part:

> "All employees are to be informed of department policies as well as necessary procedures to carry out these policies. Non-

> compliance with department policy may leave the department liable and employees vulnerable to prosecution and civil suit, as well as disciplinary action . . ."

(Ex #1 [PD-01.04.110, EFF 07/01/07]).

7. The MDOC Policy Directive PD-03.02.130 "Prisoner/Parolee grievances" provides in relevant part:

> "A grievant shall not be penalized in any way for filing a grievance except as provided in this policy for misusing the grievance process. Staff shall avoid any action that gives the appearance of reprisal for using the grievance process."

(Ex #2 [PD-03.02.130, EFF 07/09/07]).

8. The MDOC Policy Directive PD-03.03.130 "Humane Treatment and Living Condition for Prisoners" provides in relevant part:

> "Staff also are prohibited from retaliating against a prisoner who files a complaint . . ."

(Ex #3 [PD-03.03.130, EFF 02/03/09]).

9. Plaintiff, as part of exercising his constitutional right to access the court through exhausting of the grievance procedure against Defendant Bowerman, resulted in said Defendant being verbally repremanded at Step II of grievance LMF-07-08-3739-17; (Ex #4 [Steps I, II & III w/ Memo Response of 3739-17i]).

10. Plaintiff, as part of exercising his constitutional right to access the court through exhausting of the grievance procedure against Defendant Bowerman, resulted in said Defendant being disciplined; I.E., suspen-

sion without pay that was recommended by Step III of grievance LMF-07-10-5151-17; (Step I, II w/ Memo Response and Step III 5151-17i [Ex #5]).

11. Plaintiff, as part of exercising his constitutional right to access the court through exhausting of the grievance procedure against Defendant Hill, prior to the favorable initiated a grievance against Defendant Hill. (Ex #6 [Step I, II & III LMF-08-02-973-192]).

12. On February 20, 2008 Plaintiff received five of the requested law books while housed in Administrative Segregation that is loaned to Plaintiff for a minimum of 24 hours to a maximum of 48 hours. (Ex #7 [Segregation Law Library Request Form]). Authority for this derives from MDOC Policy Directive PD-04.05.120 "Segregation Standards" and PD-05.03.115 "Law Libraries."

13. On February 21, 2008 morning Plaintiff was released to general population – Plaintiff had in his possession two (2) general library books, and five (5) law library books. Plaintiff requested from Correction Officer Randal Ollis to locate the receipt for these books so Plaintiff can turn them in. By the time grievant was packed and ready to leave the receipts could not be found.

14. The MDOC Policy nor Procedure and/or LMF's Operational Procedure required Plaintiff to leave the law books in the segregation units upon reclassification back to general population.

15. Upon arrival Spruce unit around 1:15 pm Plaintiff explained to Officers Harry Tripp and Tracy Berg that grievant had law books and general library books and upon unpacking turned them in to Officer Tripp who had Porter Ritchie carry them to the Spruce Unit Officer Station.

16. Shortly after 2:30 pm Defendant Bowerman was working the Spruce Unit Officer Station when released for a shower. This Defendant was happy to see Plaintiff. Because the Spruce Unit showers "face" the Spruce Unit Officer Station Plaintiff is partially viewed naked by Defendant Bowerman.

14. At formal count Defendant Bowerman stopped at Plaintiffs assigned room saying "We straight or what?" Plaintiff ignored the Officer – then she said "I'll hangyour ass with tickets if you think your gonna stay out here with me and write more grievances on me trien to get me fired." Then walked off.

15. Later that evening Defendant Bowerman came to Plaintiff's assigned room saying "Officer Hill called about some law books, is those your books in the Officers room, Coleman-Bey?" Using her little girl voice. Again Plaintiff ignored her.

16. Defendant Bowerman, had been instructed by Lt. John Nord to stay away from Plaintiff due to the number of complaints filed against the Defendant that has been captured on the security video, on-going sexual harassment and the Defendant was instructed to work on the opposite side of the wing from Plaintiff.

17. During Plaintiffs absence due to segregation and forced to work only on one side of Spruce unit until Plaintiff left – Defendant Bowerman, was holding open conversations with other prisoners (Murry, Harris, Roberson etc. etc. . .) about Plaintiff that grievant was writing "Lying ass letters to the Warden, because he's a cry baby " Further saying "He won't be back over here while I'm here ." That Plaintiff "He's mentally sick and have a history of mental illness from his files." As if this Defendant was obsessed with Plaintiff.

18. Around 8:00 pm Defendant Bowerman slides a confiscation receipt in the side of Plaintiffs assigned room door saying, "Let me start this off – ticket grievance, grievance ticket – You don't want to make peace fuck you, I'll hang your ass on LUP!" (Ex #8 [Contraband Removal Record] of 02/21/08]).

19. The rest of the evening Paintiff Bowerman kept coming up and down the wing running showers pausing at Plaintiff's assigned room trien to get Plaintiff to talk leaving saying "Peace or war?"

20. On February 22, 2008 Plaintiff was reviewed on a retaliatory false major misconduct for "theft; possession of stolen property" by Supervisor John DeVries at approximately 7:00 pm.

21. The MDOC defines "theft; possession of stolen property" in Policy Directive PD-03.03.105 "Prisoner Discipline" stating in relevant part:

> Theft: Possession of Stolen Property
>
> "Any unauthorized taking of property which belongs to another; possession of property which the prisoner knows, or should have known, has been stolen."

(Ex #9 [Attachment B of PD-03.03.105, EFF 00/00/09]).

22. Defendant Bowerman, knew or should have known that under the definition of this particular change absent finding the law books in my possession, reported stolen by the law library – not Defendant Hill after the 24 hour loan period – and Plaintiff refuse to turn them in . . Would this be a minor misconduct. But never a major misconduct. The charge was enhanced to take retali-

ation against Plaintiff as the Plaintiff had already threatened Plaintiff.

23. Defendant Bowerman, knew that it is common practice of the racist mentality of the administrative staff that it is common practice to place prisoners back in administrative segregation upon receipt of a major misconduct the first week of release from segregation. It was not four hours after Plaintiff release from segregation did Plaintiff bring forth a concocted retaliatory major misconduct.

24. At review of the major misconduct for "Theft: Possession of stolen property" Supervisor DeVries said "Bowerman wanted me to revoke your bond, she could have did better than this – that's why no one would review it last night!" Then read the major misconduct which states in relevant part:

> "Prisoner Coleman 173324 came in Spruce unit today. Cedar unit staff called me and asked me to see if Prisoner Coleman in cell 247 still had five law books. I went to Prisoner Coleman's cell and asked him if he had the books. He then stated, "Yes, I have the law books. I took them from Cedar because, they wouldn't give me a receipt. I knew I was suppose to leave them there." "It's not like I haven't been to Seg. and back before." The prisoner knew he was suppose to leave the law books in Cedar unit."

(Ex #10 [Major Misconduct Report – Theft; Possession of Stolen Property by Bowerman of 02/21/08]),

25. Attached to the misconduct was a witness report by Defendant Hill stating:

> "This Officer was picking up law books in Cedar unit when I realized Prisoner Coleman 173324 had been released to Spruce unit. I checked his footlocker in his previous cell for his law books and then checked the law cart to see if he had the morning shift Officers put them in there. I did not find them so I called Spruce unit and spoke to RUD Bowerman and informed her that the books were missing."

(Ex #11 [Major Misconduct Witness Report by Hill of 02/21/08]).

26. Plaintiff sought a copy of the witness statement of Defendant Hill and the security camera of February 21, 2008 showing Officer Tripp at Plaintiff's assigned room picking up the law books with Prisoner Ritchie at approximately 1:30 pm – hours before Defendant Hill contacted Defendant Bowerman as alleged.

27. Defendant Hill, like Defendant Bowerman, knew or should have known that this claimed theft was not a major misconduct nor a minor misconduct that should have been authored nor witness in support, but insted Defendant Hill, like Defendant Bowerman was driven by prohibit reprisal for Plaintiffs use of the administrative grievance process that has been most favorable against Defendant Bowerman.

28. Both Defendants knew or should have known that they were prohibited from any reprisal acts and/or the <u>appearance</u> of reprisal in temporal proximity of Plaintiff's use of the grievance process.

29. That both Defendants agreeded to authort and witness a non-major misconduct within less than six hours of Plaintiff being released from segregation to

trigger Plaintiff's placement back in administrative segregation. Defendant Bowerman went so far in retaliation to "request" Plaintiff's bond revoking to ensure Plaintiff's placement back in segregation on a bondable major misconduct.

31. That Defendant Bowerman asked Plaintiff "we straight or what?" then when receiving no response started saying "I'll hang your ass with tickets if you think your gonna stay out here with me and write more grievances on me trien to get me fired!" Then later saying "let me start this off – ticket grievance, grievance ticket – you don't want to make peace fuck you, I'll hang your ass on LUP!"

32. These threatening racially animus statements to dissuade Plaintiff from the use of the administrative grievance process then concocting a non-existing major misconduct born out of the two (2) favorable grievance resort in 3739-17i and 5151-17i.

33. Defendant Bowerman, like Defendant Hill, knew that the Officers disciplinary use is one of progressive – that Defendants Bowerman's constant harassment, constant sexual harassment and inability to stay away from Plaintiff, especially after being instructed to do so – would sooner or later resulting in further disciplinary action.

34. The MDOC Policy Directive PD-02.03.100 "Employee Discipline" combined with OP-03.02.1004 "Employee Discipline" brings for use of progress discipline to obtaine Defendants Bowerman's and Hill's compliance with regulation and conditions of employment (Ex #12 [Attachment A, Disciplinary Standard of PD-02.03.100A, EFF 04/14/08]). That both Defendants Bowerman and Hill has been subject to performance rating from PD-

02.03.130 "Corrective action for performance problems", and OP-02.03.130 "Corrective actions for performance problems"

34. Plaintiff sought the assistance of the hearing investigator to collect the security video, documentary evidence, and witnesses (see face of major misconduct).

35. The MDOC Hearings Handbook, at page 17-21(c)(1) Overview-Responsibilities of Hearing Investigator-Major Misconduct Hearing, which provides in relevant part:

> "The Hearing Investigator is just that: an impartial evidence – gather, not an advocate for either the prisoner or the reporting officer."
>
> *******
>
> The full investigation of a case is absolutely essential to a fair hearing."
>
> *******

(Ex #13 [Hearings Handbook, Pages 16-21]).

36. The MDOC Disciplinary Policy PD-03.03.105 provides

> "The formal hearing is not an adversarial proceeding but is rather a fact finding process in which all parties involved have a responsibility to reveal all relevant evidence whether supportive or damaging to the person charged. Fairness is to be the paramount consideration of this hearing."
>
> "'The Hearing Investigator shall obtain answer to all questions which s/he reasonably believes are relevant,' and not a threat

> to the security of the facility. The Hearing Investigator also shall contact any other witness and obtain any documents which are relevant to the charge.'"

(Ex #14 [Superseded PD-03.03.105, p 4 and 6]).

37. Defendant Boneville's office is in the program building across from the law library. Defendant Boneville, purports to have come to Plaintiffs assigned room on February 29, 2009. Plaintiff left with a clear understanding the request for the security camera as requested on the face of the misconduct report. That if Plaintiff was out the statement would be left with the misconduct defense by the door (no room on desk for a typewriter and television).

38. On March 5, 2008 Plaintiff was contacted by Officer Maki while in the law library on behalf of Defendant Boneville for the witness statements and was relayed "on the floor by the door in the middle of the pile."

39. Defendant Boneville left an unsigned and undated Hearing Investigation Report in Plaintiffs legal footlocker (Ex #14 [Hearing Investigation Report]) that only stated: "Put it in the mail today."

40. On March 5, 2008 Plaintiff sent a memo with two attached pages in defense of the retaliatory theft; possession of stolen property by Defendants and Hill. (Ex #15 [Memo to Boneville, re: Misconduct Defense-Your Unsigned Note, of 03/05/08] Ex #16 [Memo to Boneville, re: Misconduct Defense-Theft of 03/01/08], and Ex #17 [Question for Witnesses and Reporter]).

41. Defendant Boneville did not contact Plaintiff but purported that the defense did not arrive until March 10, 2008 writing on the 'Hearing Investigator Report'

> "03/05/08 Went to Coleman cell again, not in his cell, no statement on desk, no statement in the mail."
>
> *******
>
> "Received kite in mail on 03/10/08. Did not obtain prisoner witnesses spoke to Officer Ollis via phone."

(Ex #17 [Hearing Investigator Report by M. Boneville originally dated 2/29/08]).

42. On March 11, 2008 Plaintiff appeared at major misconduct hearing in leg irons and belly chains before hearing Officer Linda G. Maki for the hearing on the retaliatory and concocted major misconduct for theft; possession of stolen property.

43. At the hearing Plaintiff was ambused with pictures of the law books in the Spruce unit Officer Station – where Officer Tripp had left them when Plaintiff turned them in the morning of February 21, 2008, a unsigned statement from Officer Ollis, no answer to any prisoner witnesses, except from staff against Plaintiff nor the two different unit security video (Ex #18 [Two Photos of Law Books], Ex #19 [Memo Fr: H.I. Boneville re: Coleman 173324, of 3/10/08]).

44. Defendant Boneville, knew that the last date of the charge to be heard was March 13, 2008 with ample enough time to contact Plaintiffs witnesses and gather the security video, but intentionally rushed Plaintiff to the hearing trien to secure a guilty findings to support Defendant Bowerman's retaliatory acts conspired with Defendant Hill.

45. Defendant Boneville, denied Plaintiff critical exculpatory evidence in the form of security video of

Spruce unit of February 21, 2008 between 2:00pm to 9:00pm and Cedar unit of Officer Hill searching the cell for the law books as claimed between 2:00pm to 9:00pm also of February 21, 2008 (Ex #20 [Memo re: security video to M. Boneville of February 28, 2008])

46. At the hearing Plaintiff submitted a two page statement in defense of the charge to Hearing Officer Maki that was not need. During the hearing the Escort Officers asked "if there is any rule that requires a prisoner to turn in his books to staff before he leaves segregation to population?" Officers Kennedy, Bradley, and Eiseman was not aware of such rule.

47. The Hearing Officer contacted contacted RUM McBurney of the administrative segregation unit by phone in Plaintiff's presence to only learn that there is nothing spelled out in writing, but "often prisoners will leave their books when they leave the unit, but sometimes take them to general population and turn them in then without any problem." (Ex #21 [Major Misconduct Hearing Report – Theft; Possession of Stolen Property of 03/11/08]).

48. The Hearing resulted in "not guilty" which reasonably means that the major misconduct should never have been wrote.

49. Plaintiff requested a copy of the Hearing Packet from Defendant Boneville.

50. On March , 2008 Defendant Boneville delivered the Hearing Packet to Plaintiff who is now back in Spruce 113 (the room Plaintiff was in prior to going to segregation on January 19, 2008 and released February 21, 2008 [see MDOC Cite Locator]) Plaintiff asked Defendant Boneville "Why didn't you turn in my original request for the two security videos and get the videos?"

The response was "I looked at Spruce video and your right Coleman you turned in the books, but I'm not gonna help you write more grievances on Bowerman you already got her in more than enough trouble why don't you just leave her alone!" then slide the Hearing Packet under the door and left

51. Defendant Boneville intentionally omitted the two security video request from the Hearing Packet given to her February 29, 2008. Then reviewed the first security video that verified that Plaintiff turned in the law books before Defendant Bowerman came to work along with the two general library books to dissuade Plaintiff from filing any more grievances on Defendant Bowerman. Without a safety or security concern coming into play.

Claims for Relief

First Cause of Action

The actions of Defendant Bowerman, in threatening Plaintiff with misconduct for Plaintiff's previous use of favorable use of the grievance process, did retaliate, within temporal proximity of Plaintiff's successful use of the administrative grievance process in violation of the First Amendment of the United States Constitution.

Second Cause of Action

The actions of Defendants Bowerman and Hill, in agreement concocted a major misconduct, in temporal proximity of favorable grievance against Defendant Bowerman did come to a mutual agreement, the retaliated against Plaintiff with a created major misconduct. To expose Plaintiff to the risk of bond revotion, assignment to administrative segregation, prolong prison staff and loss of privileges up to detention, in violation First Amendment to the United States Constitution.

Third Cause of Action

The actions of Defendant Boneville, in refusing to call the witnesses requested by Plaintiff. That the actions of Defendant Boneville in refusing to provide the security video of Spruce/Cedar unit, and providing an inadequate written reason based upon safety and/or security denied the Plaintiff of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

Fourth Cause of Action

The actions of Defendant Boneville did knowingly and willfully after reviewing the security video verified that Plaintiff gave the law books up hours before Defendant Bowerman was at work. Then verify that Defendant Bowerman never received any law books from Plaintiff conspired with Defendant Bowerman to further retaliate against Plaintiff to cover up this retaliatory created misconduct by not obtaining the security video to evade guilty findings in violation of the First Amendment to the United States Constitution.

Relief Requested

Wherefore, Plaintiff requests that this Honorable Court grant the following relief:

A. Issue a Declaratory Judgment stating that:

1. The retaliatory conduct in temporal proximity of Plaintiffs series successful grievances against Defendant Bowerman in the form of repermand then processed to disciplinary action resulting in suspension violated the Plaintiff's right under the First Amendment to the Constitution.

2. That Defendants Bowerman and Hill conspired to create a retaliatory major misconduct, exceeding their ambits of authority violated the Plaintiff's rights under the First Amendment to the United States Constitution.

3. That Defendants Boneville denial of witnesses and/or documentary evidence; i.e. both security videos absent penological justification and/or safety or security reason violated the Plaintiff's rights under the First and Fourteenth Amendment to the United States Constitution.

B. Issue an injunction ordering Defendant Boneville or their agents to:

1. That immediately that the Alger Correctional Facility Hearing Investigator cease and desist the practice of denying prisoner witness, documentation and questioning staff reporters/witnesses in connection major misconducts. That, if any, said denials be based upon the limited criterial of MCL 792.259 et al. and not based upon 'this or that' wold not prove/dispute the prisoners innocences.

C. Award compensatory damages in the following amounts:

1. $10,000 jointly and severally against Defendants Bowerman and Hill for agreement to strike at the heart of the Plaintiffs First Amendment right to petition absent retailation;

2. $10,000 jointly and severally against Defendants Bowerman and Hill for concocting the major misconduct for theft; possession of

stolen property, in temporal proximity of Plaintiffs favorable grievance responses against Defendant Bowerman in violation of Plaintiff's First Amendment to be free of retaliation, that exposed Plaintiff to punishment;

3. $15,000 against Defendant Boneville for the refusal to contact Plaintiff's witnesses and obtain the security video to stop Plaintiff from filing any additional grievances against Defendant Bowerman contrary to the First and Fourteenth Amendment absent a safety or security concern.

D. Award punitive damages in the following amounts:

1. $2,000 each against Defendants Bowerman and Hill;

2. $4,00 each against Defendants Bowerman and Hill.

3. $7,000 against Defendant Boneville.

E. Grant such other relief as it may appear that Plaintiff is entitled.

October 29, 2010, E.D.

Respectfully submitted,
s/ André Lee Coleman-Bey
André Lee Coleman-Bey
Plaintiff, in pro se
13924 Wadaga Road
Baraga, MI 49908-9204

In the United States District Court
For the Western District of Michigan

André Lee Coleman-Bey,

(Enter above the full names of all plaintiffs, including prison number, in this action.)

2:10-cv-337

v.

R. Allan Edgar, US District Judge
Timothy P. Greeley, US Magistrate Judge

Todd A. Tollefson, William Luetzow, Joseph J. Bouchard, Mary Aho, Kimberly Mieni, and James G. Armstrong.

(Enter above the full name of the defendant or defendants in this action.)

COMPLAINT

I. Previous Lawsuits

CAUTION: The Prison Litigation Reform Act has resulted in substantial changes in the ability of incarcerated individuals to initiate lawsuits in this and other federal courts without prepayment of the required $350 filing fee. Accurate and complete responses are required concerning your litigation history. Generally, a plaintiff's failure to accurately and completely answer the questions set forth below will result in denial of the privilege of proceeding *in forma pauperis* and require you to pay the entire $350 filing fee regardless whether your complaint is dismissed.

A. Have you ever filed a lawsuit while incarcerated or detained in any prison or jail facility? Yes ☒ No ☐

B. If your answer to question A was yes, for each lawsuit you have filed you must answer questions 1 through 5 below. Attach additional sheets as necessary to answer questions 1 through 5 below with regard to each lawsuit.

1. Identify the court in which the lawsuit was filed. If it was a state court, identify the county in which the suit was filed. If the lawsuit was filed in federal court, identify the district within which the lawsuit was filed.

   See Attached: Previous/Pending Litigation

2. Is the action still pending?

   Yes ☒ No ☒

   a. If your answer was no, state precisely how the action was resolved:

   See Attached: Previous/Pending Litigation

3. Did you appeal the decision?

   Yes ☒ No ☒

4. Is the appeal still pending?

   Yes ☒ No ☒

   a. If not pending, what was the decision on appeal? See Attached: Previous/Pending Litigation

5. Was the previous lawsuit based upon the same or similar facts asserted in this lawsuit? Yes ☐ No ☒

If so, explain: _____

II. **Place of Present Confinement:** Baraga Maximum Correctional Facility

If the place of present confinement is not the place you were confined when occurrence that is subject of instant lawsuit arose, also list the place you were confined: Baraga Maximum Correctional Facility, Baraga, MI

III. **Parties**

In item A below, place your name in the first blank and your present address in the second blank. Do the same for additional plaintiffs, if any.

A. Name of Plaintiff André Lee Coleman-Bey #173324

Address 13924 Wadaga Rd, Baraga, MI 49908-9204

In item B below, place the full name of the defendant in the first blank, his or her official position in the second blank and his or her place of employment in the third blank. Use item C for the names, positions and place of employment of all additional defendants. Attach extra sheets as necessary. **State whether you are suing each defendant in an official or personal capacity.**

B. Defendant Todd Tollefson is employed as ~~Assistant Resident Unit Manager~~ at ~~West Bluewater Hwy, Ionia, MI 48846~~

C. Additional Defendants N/A

Todd A. Tollefson Assistant Resident Unit Supervisor, Joseph J. Brouchard @ 13924

Wadaga Road, Baraga, MI 49948-9204 Baraga Max Correctional Facility; James G. Armstrong, MDOC Central Office, PO Box 3003, Lansing, MI 48909; William Leutzow-Retired; Mary Aho-Retired; Kimberly Mieni-Retired

IV. Statement of Claim

State here as briefly as possible, the facts of your case. Describe how each defendant is personally involved. Include also, the names of other persons involved, dates and places. **Do not give any legal arguments or cite any cases or statutes.** If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheets if necessary.

[See Attached Pages]

V. Relief

State briefly and precisely what you want the court to do for you.

[See Attached Pages]

November 22, 2010, E.D. — **Date**

s/ André Lee Coleman-Bey — **Signature of Plaintiff**

NOTICE TO PLAINTIFF(S)

The failure of a *pro se* litigant to keep the court apprised of an address change may be considered cause for dismissal.

[Attached Pages – Handwritten]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

André Lee Coleman-Bey,

Plaintiff,

Complaint

vs.

Jury Trial Demanded

Todd A. Tollefson, William Luetzow, Joseph J. Bouchard, Mary Aho, Kimberly Mieni, and James G. Armstrong.

Defendants.

/

INTRODUCTION

Preliminary Statement

This is a civil rights action filed by André Lee Coleman-Bey, a state prisoner for damages and Injunctive Relief under 42 U.S.C. §§ 1983, 1985(3) and 1986. Alleging that Defendant Tollefson, backed by Defendant Luetzow intentionally rejected Plaintiff's meritorious grievance out of racial animus, that Defendants Bouchard and Aho, did not ensure that the delivery of the legal photo copies when completed. Defendant Mieni, received the legal photo copies after Plaintiff's mental error wrote 1 unit, room 116 instead of 5 unit, 116; did not either return the completed legal photo copies to Plaintiff and/or return them to the law library to Plaintiff

knowingly knowing that Plaintiff was already scheduled for transfer July 5, 2006. Plaintiff completed the administrative grievance process, but Defendant Armstrong held the Step III grievance appeal over a year – a process that was to take 90 days. Plaintiff could have used a timely Step III appeal as a key exhibit for a Motion for Reinstatement of Dismissal action within 182 days and/or Motion for Relief from Judgment or Order within a year; as a result of these combined racial animus and shiftless work habits Plaintiff suffered a litigation related injury when the Defendants did not provide Plaintiff with the photo copies of the legal documents and/or return the original documents which was an essential component to Plaintiff's access to the courts in the Ingham County Circuit Court in violation of Plaintiffs First Amendment of the United States Constitution and Fourteenth Amendment to the United States Constitution. Plaintiff engaged the administrative grievance process that not only was rejected at Step I and upheld at Step II of the meritorious grievance, but held over a year at Step III before answering; because of these difficulties and harm contributed to the loss of a litigation thus denying Plaintiff access to courts in violation of the First Amendment of the United States Constitution.

Jurisdiction

This Honorable Court has subject matter jurisdiction over Plaintiff's claims of violation of Federal Constitutional rights under 42 U.S.C. §§ 1331(a) and 1343.

Venue:

The venue is proper in this District because significant act of the key Defendants named occurred in the Western District of Michigan. Mainly Baraga County located in the upper regions of Michigan.

Parties

1. Plaintiff, André Lee Coleman-Bey, is and was at all times relevant to this action, once again confined at the Baraga Maximum Correctional Facility in Baraga, MI. Plaintiff is a African-American male and a U.S. citizen.

2. Defendant, Todd A. Tollefson, is and was at all times relevant to this action, is currently employeed as an Assistant Resident Unit Supervisor (ARUS), formerly a Grievance Coordinator working at the Baraga Maximum Correctional Facility in Baraga, MI. Defendant Tollefson, is a racist European male and a U.S. citizen.

3. Defendant, William E. Luetzow, is and was at all times relevant to this action, is currently a former Assistant Deputy Warden (formerly Defendant Tollefson's supervisor) retired from Baraga Maximum Correctional Facility in Baraga, MI. Defendant Luetzow, is a European male and a U.S. citizen.

4. Defendant, Joseph J. Bouchard, is and was at all times relevant to this action, is employeed as the Law Librarian working at the Baraga Maximum Correctional Facility in Baraga, MI. Defendant Bouchard is a European male and a U.S. citizen.

5. Defendant, Mary Aho, is and was at all times relevant to this action, a former Assistant Law Librarian of the Baraga Maximum Correctional Facility currently retired. Defendant Aho, is a European female and U.S. citizen.

6. Defendant, Kimberly Mieni, is and was at all times relevant to this action, is a former Resident Unit Manager (RUM) of the Baraga Maximum Correctional Facility currently retired. Defendant Mieni, is a Native-American female and a U.S. citizen.

7. Defendant, James G. Armstrong, is and was at all times relevant to this action, a former Manager of the Grievance and Appeal Section of the Legal Affairs Section of the Central Office. Defendant Armstrong is a European male and a U.S. citizen.

8. Defendant's was acting under the color of state law and is sued in their individual capacity (for compensatory damages and punitive damages), and official capacity (for prospective injunctive relief).

STATEMENT OF FACTS

9. In November 2004 Plaintiff was housed at the Alger Maximum Correctional Facility in Alger, MI. Locking in Birch unit under the supervision of Catherine S. Bauman (RUM [currently the warden]) and Case Manager (C/M) Lynne Phillipson. These non-defendants was the main source of Plaintiff's issues having to file a series of grievances against Phillipson and Bauman. Phillipson, has a habit of fabricating sexual misconducts on African-American prisoners who used the administrative grievance process against here.

10. On November 3, 2004 Phillipson fabricated the first sexual misconduct – that was not a sexual misconduct under MDOC definitions – which was upheld at the administrative hearing and request for rehearing.[1]

11. On November 4, 2004 Phillipson fabricated the second sexual misconduct – alleging that at approximately 10:00am – this date Plaintiff sought the security video

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[1] See Coleman-Bey vs. Sweeney, et al., Docket No.: 2:09-cv-178 currently in the U.S. Court of Appeals of the Sixth Circuit in Docket No.: 09-2419.

to show that Phillipson was never on the wing a half an hour before nor a half an hour after 10:00am.

12. On November 23, 2004 the hearing came about and the security video showed that Phillipson was not on the wing to make such an observation. Yet, Plaintiff was found guilty. A timely Request for Rehearing was filed, but was denied on August 2, 2005 (Ex #1 [Denied Request for Rehearing 8/2/05]).

13. On September , 2005 the Ingham County Circuit Court Plaintiff's Petition for Judicial Review of the August 2, 2005 denied Request for Rehearing. An order was issued to pay the initial partial filing fee of $3.19.

14. Plaintiff paid the initial partial filing fees of $3.19 to initiate the assignment of a Judge and Docket number. On October 20, 2005 this was done in Coleman-Bey vs. MDOC and Patricia Caruso., Docket No.: 05-1235-AA.

15. Plaintiff received all three copies of the Petition for Judicial Review without the summons page absent the docket and assigned judge.

16. On November 4, 2005 Plaintiff was transferred to the Baraga Maximum Correctional Facility in Baraga, MI (Ex #2 [Transfer Order of 11/4/05]).

17. On November 14, 2005 Plaintiff wrote to the Ingham County Circuit Court Clerk Mike Brannon about the return of the pleadings, absent the normal summons, assigned judge and docket number. There was no response (Ex #3 [Letter to M. Brannon, County Clerk 11/14/05] and Ex #4 [Expedited Legal Mail Form to M. Brennan 11/4/05]).

18. On December 14, 2005 Plaintiff was forced to serve the respondent MDOC and the respondent Coun-

sel Attorney General without a docket number nor assigned Judge and Proof of Service upon Mike Brannon as required by MCR 7.105 (Ex #5 [Expedited Legal Mail Form L. Friedman – Corrections Division 12/14/05], Ex #6 [Expedited Legal Mail Form M. Wallace – MDOC Litigation Coordinator 12/14/05], and Ex #7 [Expedited Legal Mail Form M. Brannon w/ Cover Letter 12/14/05]).

19. On February 6, 2006 Plaintiff wrote to the Michigan Supreme Court Administrative Office – James P. Hughes, Region II Administrator.

20. On March 17, 2005 Hughes wrote Plaintiff back, but the letter was returned due to the lack of Plaintiff's inmate number on the envelope face (Ex #8 [Envelope Face Postal Marked March 17, 2005]).

21. On March 20, 2005 Plaintiff had family friend Nancy Gehringer pay for a copy of the docket sheet (Ex #9 [Docket Sheet in Coleman-Bey vs. MDOC, Docket No.: 05-1235-AA]).

22. On March 30, 2006 armed with the assigned judge and docket sheet case number Plaintiff wrote Judge James R. Giddings notifying the judge that Plaintiff had served the necessary Respondents and ready to proceed. (Ex #10 [Letter to Judge Giddings of 3/30/06 with proof of service upon the respondents]).

23. On June 5, 2006 Plaintiff received the remanded letter from Hughes (Ex #11 [Hughes Letter of 3/17/06]), and Ex #12 [Envelope Face of Remailing of June 1, 2006]).

24. On June 13, 2006 Plaintiff filed a default motion with a notice of hearing (Ex #13 [Default Motion w/ Notice of Hearing of 6/13/06]).

25. On June 29, 2006 Plaintiff acting on Hughes letter submitted the only remaining copy of the Petition for Judicial Review to 5 unit ARUS Lincon Marshall to be delivered to Defendant Aho and/or Defendant Bouchard for copies to be made to re-serve the respondents (Ex #14 [Legal Photocopy Disbursement of 6/29/06]).

26. On June 30, 2006 Defendant Mieni was on the wing and paused at Plaintiff's assigned room asking "Coleman what unit is this?" Plaintiff responded said "5 unit, why?" Defendant Mieni, retorted say "Assistant Librarian Aho called asking where you locked because you wrote 1 unit, 116 instead of 5 unit, 116 – You will get them tomorrow if she does not drop them off on her way home today." Then walked down the wing.

27. On July 3, 2006 Plaintiff again spoke with Defendant Mieni, who said that "I'll check my box today and call you out later" – said Defendant never called Plaintiff out to pick up the legal photocopies of the Petition for Judicial Review.

28. That night Plaintiff wrote Defendant's Aho and Bouchard inquiring about the legal photocopies and relating what Defendant Mieni said. There was never a response.

29. On July 5, 2006 Plaintiff was transferred to the Ionia Maximum Correctional Facility in Ionia, MI (Ex #15 [Transfer Order of 6/5/06]).

30. The Defendant's Policy Directive 03.02.130 "Prisoner/Parolee Grievances" provides in relevant part:

> "The grievance is filed in a untimely manner. The grievance shall not be rejected if there is a valid reason for the delay; e.g., transfer."

(PD-03.02:130, EFF 12/19/03 [Ex #16]).

31. On July 16, 2006 Plaintiff had not received the photocopies a Step I grievance was initiated and mailed back to AMF. On July 24, 2006 Defendant Tollefson received the Step I grievance first assigning grievance identifier: AMF-06-07-02423-14F, but later changed to 28E – Rejection. Despite grievant mention in the top and body of the grievance ("grievance delayed due to transfer to ICF") that a valid reason exist for the delay in the grievance, it was rejected as untimely.

32. Defendant Tollefson rational for the rejection was:

> "The grievant failed to submit this grievance within the time limits set forth in PD-03.02.130 and is therefore rejected. It is not, however, that since no evidence could be found to show that grievant received the copies in question his account will be reimbursed $.80."

(Ex #17 [Step I response AMF-06-07-2423-28E]).

33. This denial of access to the courts by way of rejection of this meritous grievance was supported by Defendant Luetzow. Ironically, said Defendant signed as approving the rejection 7-25-06. But as the reviewer he must review the proposed Step I response. However, Defendant Tollefson did not complete the actual rejection until 8/3/06.

34. The denial of access the courts by way of rejection of this meritous grievance was/is contrary to department policy mentioned, and impeded Plaintiff's ability to obtain the copies of the original documents and/or copies from the legal writer files.

35. Defendant Tollefson clearly contacted Defendant Aho and/or Defendant Bouchard to state that "since no evidence could be found to show the grievant received the copies in question . . ."

36. Defendants Aho and/or Bouchard knew or should have known that they should have jointly and/or severally ensured that once the legal photo copies was made be delivered to Plaintiff as soon as administratively feasible within the time limitations of OP-CFA-05.03.115, instead they took no action.

37. Defendants Aho and/or Brouchard, made the legal photocopies, bill Plaintiff's account $1.80 but never ensured that they were returned to Plaintiff as required, but Defendant Aho contacted Defendant Mieni, inquiring about Plaintiff's housing due to Plaintiff's mental error of writing A 1 instead of 5.

38. Defendant's Tollefson and Luetzow knew or should have known that the "immediate forward the legal photo copies. " Does not mean 'reimbursement' – the object of Plaintiff's legal copies was to made to reserve the Respondents pursuant to Hughes letter. Without the copies this could not be achieved and this moots re-serve.

39. Plaintiff appealed to Step II, but again was denied at Step II. (Ex #18 [Step II AMF-06-07-2423-28E w/ Memo Response]).

40. Plaintiff had two viable options to get the "no progress" docket reactived but was locked into a 182 time limitation, and as a fall back a one year time limitation. Either way Plaintiff would never not only the original date stamped Petition for Judicial Review reflecting the time/date originally received by the Clerk of the

Court in Ingham County and all three steps of grievance AMF-06-07-2423.28E.

41. On November 2, 20, 2006 Plaintiff appealed Step III to Defendant Armstrong. Defendants policy directive 03.02.130 placed a 90 day cap on the start to finish of grievances and appeals. Stating in relevant part:

> "The total grievance process from the point of filing a Step I grievance to providing a Step III response shall be completed within 90 calendar days unless an extension has been approved in writing by the Grievance Coordinator or the Prisoner Affairs section at one of the steps in the grievance process. An extension shall not exceed 15 business days. The Grievance Coordinator or, at Step III, the Prisoner Affairs Section shall immediately notify the grievant in writing whenever an extension has been approved, the extension also shall be noted in the grievance response."

(Ex #19 [PD-03-02-130, Subsection U, EFF 12/19/03]).

42. Defendant Armstrong, did not notify Plaintiff in writing of any such extension nor cited in the body of the response anything about any extensions, as required, but instead held the the Step III appeal from November 27, 2006 to November 29, 2007 (Ex #20 [Step III AMF-06-07-2423-14F]).

43. Defendant Armstrong, was armed with the relief sought, the photocopy of the legal photocopy disbursement Plaintiff received from ARUS Marshall October 29, 2006 clearly reflecting that Plaintiff sought the immediate return of the legal photocopies which cost $1.80 not 80¢ and the return of the original nine pages.

44. Defendant Armstrong disregarded this facts, but did determine that this was a meritous grievance and should not have been rejected and filed as timely. No further investigation was conducted concluding:

> "The grievant did not provide sufficient evidence to support his allegation. Without such evidence, his allegations cannot be substantiated."

(Ex #20 [Step III AMF-06-07-2423]).

45. Plaintiff was given the opportunity to reserve the Respondents attorney H. Steven Langschwager, Assistant Attorney General, but could not due to the rejection of the Step I grievance by Defendant's Tollefson and Luetzow.

46. Plaintiff could have taken other action pursuant to the Michigan Court rules within 182 days from May 3, 2005 and/or one year from May 3, 2005 but due to the non-receipt of the legal photocopies and originals by Defendant's Aho, Bouchard and Meini Plaintiff could not.

47. Defendant's Tollefson and Luetzow knew or should have known not to reject AMF-06-07-2423 as untimely, but they conspired to do so anyway. Defendant Luetzow answered Step II appeal for the warden and stood firm on the original rejection. Thus, impeding Plaintiff's access to the courts.

48. Defendant Armstrong could have correct this and addressed Plaintiff grievance within 90 days and/or sought an extension and ordered Plaintiff to investigate the wherefores of Plaintiff's legal papers and legal photocopies and the immediate return to Plaintiff but he did not.

Claims for relief

First Cause of Action

Defendant's Aho and Bouchard, did willfully, and knowingly did not provide the requested legal photocopies nor return the originals of the legal photocopies that deprived Plaintiff of the opportunity to reserve the respondents and provide proof of service upon the Clerk of the Court, contrary to the First Amendment of the United States Constitution.

Second Cause of Action

Defendant's Aho and Bouchard, did willfully, and knowingly not forward the completed legal photocopies and the originals to Plaintiff at the Ionia Maximum Correctional Facility thus preventing reserve or any other authorized court rule motion to reactivate the Petition for Judicial Review from no progress docket resulting in injury, contrary to the First Amendment of the United States Constitution.

Third Cause of Action

Defendant Tollefson and Luetzow arbitrarily and capriciously rejected Step I and Step II grievance AMF-06-07-2423 as untimely thus mooting a meritorious grievance prohibiting a proper investigation and possible resolution of the grievance thereby impeding Plaintiffs access to court, contrary to the First Amendment of the United States Constitution.

Fourth Cause of Action

Defendant Armstrong, did willfully, and knowingly hold the Step III appeal of grievance AMF-06-07-2423 for over a year from receipt of of the appeal without just

cause, without completing any further investigation that further impeded Plaintiff access to courts, contrary to the First Amendment of the United States Constitution.

Relief Requested

Wherefore, Plaintiff requests that the court grant the following relief:

A. Award compensatory damages in the following amounts:

1. $10,800 against Defendants Meni, Aho, and Brouchard for failure and/or refusal to ensure that Plaintiff received his legal photocopies and originals back within the established time limitations of OP-CFA-05.03.115;

2. $12,00.80 against Defendants Tollefson and Luetzow for arbitrary rejecting Step I and Step II AMF-06-07-2423 a meritorious grievance impeding the ability to investigate, resolve and petition the government for redress;

3. $16,000 against Defendant Armstrong for arbitrarily holding this meritorious Step III grievance appeal over a year, mooting any further access to courts within 182 days and/or 365 days without just cause and against the MDOC Policy and Procedure.

B. Award punitive damages in the following amounts:

1. $1400.40 Punitive damages;

2. $6,000.40 Punitive damages; and

3. $3,000.00 Punitive damages.

C. Transfer Plaintiff to Level II to complete assaultive offenders group programs and the MPRI Programs;

D. Provide Plaintiff immediately with four (4) blue legal footlockers to properly store his legal property consistent with OP/PD-04-07.112 and PD-04.03.120 that will travel with Plaintiff from prison-to-prison without confiscation in general population; and

E. Grant such other relief as it may appear that Plaintiff is entitled.

Respectfully Submitted,

s/ André Lee Coleman-Bey
André Lee Coleman-Bey
Plaintiff in pro se

November 22, 2010, E.D.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

André Lee Coleman-Bey,

Plaintiff.

vs.

Toff Tollefson, et al.

Defendants.

_____/

Previous Litigations

1. Coleman-Bey vs. Dahlstrom, et al. Western District/Northern Docket No.: 2:05-cv-30, Sixth Cir. No.: 06-1544, U.S. Supreme Ct. No.: 08-9626

2. Coleman-Bey vs. Brouchard, et al. Western District/Northern Docket No.: 2:04-cv-268, Sixth Cir. No.: 06-2461, U.S. Supreme Ct. No.:0

3. Coleman-Bey vs. Gerth, et al. Western District/Northern Docket No.: 2:05-cv-158, Sixth Cir. No.: 07-1270

4. Coleman-Bey vs. Granholm, et al.
No.: 2:06-cv-12485, Sixth Cir. No.:

5. Coleman-Bey vs. Vroman, et al.
District Ct.–Southern/Federal Pending

6. Coleman-Bey vs. Trieweiler, et al.
District Ct.–Western/Federal On appeal U.S. Supreme Ct. Pending

7. Coleman-Bey vs. Granholm, et al.
   District Ct.–Eastern/Federal Pending on appeal Sixth Circuit

8. Coleman-Bey vs. Tollefson
   District Ct.–Western/Federal Just Filed

9. Harris vs. Gerth, et al.
   District Ct.–Southern/Federal. Pending on Appeal – Sixth Circuit

10. Coleman-Bey vs. Sweeney, et al.
    District Ct.–Western/Federal Pending on Appeal – Sixth Circuit

In the United States District Court
For the Western District of Michigan

André Lee Coleman-Bey

(Enter above the full names of all plaintiffs, including prison number, in this action.) **1:11-cv-108**

v.

Gordon J. Quist-U.S. District Judge
Ellen S. Carmody-Magistrate Judge

Stephen Dykehouse, Ronald T. Embry, Debra S. Olger and Sam Norman

(Enter above the full name of the defendant or defendants in this action.)

COMPLAINT

I. Previous Lawsuits

CAUTION: The Prison Litigation Reform Act has resulted in substantial changes in the ability of incarcerated individuals to initiate lawsuits in this and other federal courts without prepayment of the required $350 filing fee. Accurate and complete responses are required concerning your litigation history. Generally, a plaintiff's failure to accurately and completely answer the questions set forth below will result in denial of the privilege of proceeding *in forma pauperis* and require you to pay the entire $350 filing fee regardless whether your complaint is dismissed.

A. Have you ever filed a lawsuit while incarcerated or detained in any prison or jail facility? Yes ☒ No ☐

B. If your answer to question A was yes, for each lawsuit you have filed you must an-

swer questions 1 through 5 below. Attach additional sheets as necessary to answer questions 1 through 5 below with regard to each lawsuit.

1. Identify the court in which the lawsuit was filed. If it was a state court, identify the county in which the suit was filed. If the lawsuit was filed in federal court, identify the district within which the lawsuit was filed.

   See Litigation Page.

2. Is the action still pending?

   Yes ☒ No ☒

   a. If your answer was no, state precisely how the action was resolved:

   See Litigation Page.

3. Did you appeal the decision?

   Yes ☒ No ☐

4. Is the appeal still pending?

   Yes ☒ No ☒

   a. If not pending, what was the decision on appeal? See Attached Litigation Page.

5. Was the previous lawsuit based upon the same or similar facts asserted in this lawsuit? Yes ☐ No ☒

   If so, explain: _____

II. Place of Present Confinement:_____

If the place of present confinement is not the place you were confined when occurrence that is subject of instant lawsuit arose, also list the place you were confined: Ionia Maximum Correctional Facility Ionia, MI

Alger Maximum Correctional Facility Munising, MI

III. Parties

Place your name in the first blank and your present address in the second blank. Provide the same information for any additional plaintiffs. Attach extra sheets as necessary.

Name of Plaintiff André Lee Coleman-Bey

Address Baraga Maximum Correctional Facility, 13924 Wadaga Road, Baraga, MI 49908-9204 #173324

Complete the information requested below for each defendant in this action, including whether you are suing each defendant in an official and/or personal capacity. If there are more than four defendants, provide the same information for each additional defendant. Attach extra sheets as necessary.

Name of Defendant #1 Stephen Dykehouse

Position or Title Case Manager (C/M)

Place of Employment Ionia Maximum Correctional Facility

Address 1576 W. Bluewater Hwy., Ionia, MI 48846

Official and/or personal capacity? Both

Name of Defendant #2 Ronald T. Embry

Position or Title Resident Unit Manager (RUM)

Place of Employment Ionia Maximum Correctional Facility

Address 1576 W. Bluewater Hwy, Ionia, MI 48846

Official and/or personal capacity? Both

Name of Defendant #3 Debra S. Olger

Position or Title Correction Officer (C/O)

Place ofEmployment Alger Correctional Facility

Address PO Box 600, Munising, MI 49862-0600

Official and/or personal capacity? Both

Name of Defendant #4 Sam Norman

Position or Title Sergeant

Place ofEmployment Alger Correctional Facility

Address PO Box 600, Munising, MI 49862-0600

Official and/or personal capacity? Both

Name of Defendant #5_____

Position or Title_____

Place ofEmployment_____

Address_____

Official and/or personal capacity?_____

IV. Statement of Claim

State here as briefly as possible, the facts of your case. Describe how each defendant is personally

involved. Include also, the names of other persons involved, dates and places. **Do not give any legal arguments or cite any cases or statutes.** If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheets if necessary.

[See Attached Pages]

V. Relief

State briefly and precisely what you want the court to do for you.

[See Attached Pages]

January 24, 2011, A.D. — Date

s/ André Lee Coleman-Bey — Signature of Plaintiff

NOTICE TO PLAINTIFF(S)

The failure of a *pro se* litigant to keep the court apprised of an address change may be considered cause for dismissal.

[Attached Pages – Handwritten]

Previous Litigations

Coleman-Bey vs. Kinnunen
USDC 2:05-cv-256
COA 06-1003 and 08-1497

Coleman-Bey vs. Brouchard, et al.
USDA 2:04-cv-268
COA 06-2461
USSC 08-7626

Coleman-Bey vs. Gerth, et al.
USDA 2:05-cv-158
COA 07-1270

Coleman-Bey vs. Dahlstrom, et al.
USDA 2:05-cv-30
COA 06-2461

Coleman-Bey vs. Bowerman
USDA 2:09-cv-24

Coleman-Bey vs. Bowerman, et al.
USDA 2:10-cv-322

Coleman-Bey vs. Tollefson, et al.
USDA 2:10-cv-337

Coleman-Bey vs. Granholm, et al.
USDA 2:06-cv-12485
COA

Coleman-Bey vs. Vroman, et al.
USDA 1:10-cv-354

Coleman-Bey vs. Sweeney, et al.
COA 2:09-cv-178
COA 09-2419

Coleman-Bey vs. Trieweiler, et al.
USDA 2:09-cv-178
COA 09-1826

Harris, et al. vs. Gerth, et al.
USDA 2:08-cv-12374
COA 10-1122

[Attached Pages – Typed]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANDRÉ LEE COLEMAN-BEY,

PLAINTIFF,

vs.

STEPHEN DYKEHOUSE, RONALD T. EMBRY, DEBRA S. OLGER AND SAM NORMAN,

DEFENDANT'S.

_____/

"THE FEDERAL COURTS MUST BE VIGILANT IN PREVENTING THE EROSION OF FREE SPEECH BY THE FEDERAL AND STATE GOVERNMENTS"

ANDRÉ LEE COLEMAN-BEY
PLAINTIFF, IN PRO SE (#173324)
BARAGA CORRECTIONAL FACILITY
13924 WADAGA ROAD
BARAGA, MICHIGAN 49908-9204

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANDRÉ LEE COLEMAN-BEY,

PLAINTIFF, **COMPLAINT**

VS. **JURY TRIAL DEMANDED**

STEPHEN DYKEHOUSE, RONALD T. EMBRY, DEBRA S. OLGER AND SAM NORMAN,

DEFENDANT'S.

_____/

INTRODUTION

PRELIMINARY STATEMENT

This is a civil rights action filed by André Lee Coleman-Bey, A state convict for damages, Declaratory and Injunction Relief under 42 U.S.C. Scc 1983. Alleging first that defendant Dykehouse, arbitrarily sabotaged an informational administrative hearing on a rejected under authority of MDOC Policy Directive, 05.03.118 "PRISON MAIL" a warranty return SUPER GE III AM/FM radio from Thomson, Inc., Product Exchange Center in Socorro, Texas, while at the Ionia Correctional Facility. When grieved plaintiff won the relief of a new hearing under authority of MDOC Policy Directive, 03.02.130 "Prisoner/Parolee Grievances" Before a second hearing could be conducted, plaintiff rode out to the Alger Correctional Facility in Alger, MI. The MDOC Policy authorized rejected radio moved with plaintiff. Second, while at the Alger Facility, defendant Olger sent plaintiff Notice of Disposal, giving the plaintiff ten days to mail the MDOC

Policy Authorized rejected radio home and/or have picked up on a visit. Said latter defendant was functioning from MDOC Policy Authorized Policy Directive 04.07.112 "Prisoner Personal Property"

Plaintiff contacted defendant Olger, armed with step ICF-07-07-1166 and 1167, that pursuant to MDOC Policy Authorized not only a second administrative hearing under the authority of Administrative Rule 791.3301 and further engaged authority pursuant to PD-04.07.112 that the policy authority rejected SUPER GE III AM/FM radio be held until the exhausting of the administrative grievance process pursuant to PD-03.02.130. Said the defendant contacted defendant Embry, and informed that the Administrative Hearing by defendant Dykehouse was indeed over turned. In essence, per the authority of PD-03.02.130. This did not set well with the other defendant. Plaintiff not only appealed to Step II, but also contacted defendant Norman who promised to hold the policy authorized rejected AM/FM radio until the documentation was forwarded. The Step II once again granted further relief that defendant Embry would forward the documentation to the plaintiff's current location so that the policy authorized second hearing could be held. Third, defendant Olger destroyed the warranty return radio with the blessing of defendant Norman who claimed that defendant Embry, never forwarded the paper work as promised. This is contrary to policy authorization and abridges plaintiff's First Amendment Right to broadcast real-time entertainment and real-time free flowing information of the United States Constitution and the Fourteenth Amendment of the United States Constitution.

JURISDICTION

This Honorable court has jurisdiction over plaintiff claims of violation of Federal Constitutional Rights under 42 U.S.C. Scc 1331 (a) and 1343. Declaratory Relief is authorized by Fed. R. Civ. P. 57, and by 28 U.S.C. 2201 and 2202. This Honorable Court has jurisdiction to grant Injunctive Relief pursuant to Fed. r. Civ. P. 65.

VENUE

The venue is proper in this District because significant acts of the defendant's has occurred in the Southern Division of Michigan. Mainly Ionia County located in Ionia, MI.

PARTIES

1. Plaintiff, André Lee Coleman-Bey, is and was at all times relevant to this action, is a African-American male convict at the Baraga Correctional Facility (Formally Ionia Correctional Facility in Ionia, MI.)

2. Defendant, Stephen Dykehouse, is and was at all times relevant to this action, a Case Manager employed at the Ionia Correctional Facility in Ionia, MI. defendant is a European male and a U.S. Citizen.

3. Defendant, Ronald T. Embry, is and was at all times relevant to this action, a resident Unit Manager (RUM) and supervisor of Dykehouse employed at the Ionia Correctional Facility in Ionia, MI. defendant is a African-American male and a U.S. Citizen.

4. Defendant, Debra S. Olger, is and was at all times relevant to this action, a Property Room Officer employed at the Alger Correc-

tional Facility in Alger, MI. defendant is a european female and a U.S. Citizen.

5. Defendant, Sam Norman, is and was at all times relevant to this action, a sergent and supervisor of the Property Room Officers employed at the Alger Correctional Facility in Alger, MI. defendant is a European male and a U.S. Citizen.

6. An defendant's was acting under color of state law and is sued in their individual capacity (for compensatory and punitive damages) and official for Declaratory and Injunctive Relief.

STATEMENT OF FACTS

7. While at the Baraga Correctional Facility in 2006 the handle cracked on plaintiff's personally owned Super GE III AM/FM Radio. Plaintiff's obtained a "return authorization" from Thomson, *Inc.*, and was authorized by AMF property room officer to return the radio for replacement of handle under authority of MDOC POLICY DIRECTIVE, 04.07.112 "PRISONER PERSONAL PROPERTY". EX #1 [return authorization blank form], and EX #2 [PD-04.07.112, Effective date: 11-15-04].

8. Plaintiff road out to the Ionia Correctional Facility in Ionia, MI. Plaintiff notified Thomson, Inc., consumer section of change of address with no form of response nor return of repaired AM/FM radio.

9. Plaintiff was repeatedly transferred and with no response from Thomas, Inc., an informal complaint was filed with the Indiana Attorney General consumers protection division who contacted Thomas, Inc.

10. Not known to plaintiff that Thomas, Inc. electronic section was sold to another company. Changing from General Electric. The Indiana Consumer protection unit provided the current address to Thomas, Inc., who acknowledged receipt of the GE AM/FM radio from plaintiff in late May 2006, but had no record of any transaction and thus agreed to return a new RCA Super III AM/FM radio in addition, the Indiana Consumer Protection Division contacted Ionia Correctional Facility assistant deputy warden Erica Huss, and followed up with a letter with supporting documents.

11. Nearly a year later Thompson, Inc., agreed to forward a letter but was once again contacted by the Ionia Correctional Facility staff to Include an "INVOICE" saying that this was a warranty replacement radio Super GE III and a former subsidiary of General Electric sold to RCA, per ADW Huss.

12. Not known to plaintiff that Thompson, Inc. had once again contacted the Ionia Correctional Facility speaking with plaintiff's Case Manager defendant Dykehouse who changed the need for the "invoice"

13. Prior to June 21,2007 defendant Dykehouse, stopped plaintiff in the hall and informed

him that, "a replacement radio was on the way that he had just received a phone call", but would not say from whom and asked plaintiff if he had a receipt of mailing a radio out . . . , then finished off saying, "it probably will be rejected when it gets here and we'll have to do a hearing."

14. Within a week, plaintiff received a "Package/Letter Rejection Notice", from ICF Property Room Officer Eveans. Plaintiff requested an informal hearing.

15. On June 21,2007 plaintiff was summons to defendant Dykehouse office, with the replacement RCA Super GE III AM/FM radio present. First, said defendant claimed that no such radio had been sold by the department. Plaintiff produced the receipt of purchase from 1992 when plaintiff first purchased the GE Super II AM/FM radio while at the Oaks Correctional Facility in Eastlake, MI.

16. The squabbling went back and forth over the RCA and GE label brand once plaintiff produced documents of mailing cost him from the Baraga Correctional Facility to the Thompson, Inc., and pick-up contraband removal record signed by AMF Property Room Officer Danny Loosemove (Ex #3 [Contraband Removal Record of 5/4/06]).

17. Such made no different when defendant Dykehouse said, "I talked to Thompson, Inc., Representative Consumer Service ."

Thus having formulated a predisposition. (Ex #4 [Administrative Rule 791.3301]).

18. Plaintiff with the authority of MDOC Policy Directive .03.02.130 grieved the hearing in two separate veins. The first that MDOC Policy Directive .05.13.118 defines mail. That a "Radio" does not fit under the description of mail, but should have been rejected under the authority of MDOC Policy Directive 04.07.112 and not PD-05.03.118 and a Notice of Intent would have allowed for ADW Huss to be contacted to produce the communication from Indiana Attorney General Consumer Specialist explaining why the authorized warranty replacement said "RCA" instead of "GE" Such was ignored in plaintiff's written statement. (Ex #5 [Step I ICF-07-07-1166]) (Ex #6 [PD-05-03-118, 1/1/06]).

19. Plaintiff with the authority of MDOC Policy Directive .03.02.130. The second grievance that R791.3301 prohibited Dykehouse from conducting the hearing due to his prior knowledge of being directly involved in the matter upon talking to the Consumer Representative of Thompson Inc., and altering the need for the "invoice" that would explain why "RCA" instead of "GE" and why a AM/FM Radio was being sent to plaintiff. defendant Dykehouse totally disregarded plaintiff's fundamental of due process rights born out of the Michigan Consumer Protection Act (Ex #7 [Step I ICF-07-07-1167].

20. On July 17, 2007, plaintiff was suspiciously transferred to the Alger Correctional Facility in Munising, MI. (Ex #8 [Transfer Order FR: ICF To: LMF of 7/17/07]).

21. On June 20, 2007, defendant Embry answered grievances' ICF-07-07-1166 and 167 and under the authority of MDOC Policy Directive .03.02.130 reversed the Administrative Hearing conducted by defendant Dykehouse. These decisions was supported by ADW Huss (Ex#9 [Step I ICF-07-07-1166 response], and Ex#10 [Step I ICF-07-07-1167 response]).

22. Plaintiff was notified by defendant Olger with notice of disposal saying that plaintiff had ten days to mail the warranty replacement out and/or have picked up on a visit.

23. Plaintiff responded with a copy of the Step I grievance favorable decision of ICF-07-07-1166 and 1167, to defendant Olger. In turn, said defendant informed plaintiff that she would contact defendant Embry as there is "no such thing as a second informal hearing – like a minor misconduct once it is reversed it's dead." All plaintiff said was, "I know!"

24. Defendant Olger spoke with plaintiff in person prior to October 21, 2007, asking to see the Step II Appeal decision. But plaintiff had not appealed due to the favorable Step I Response that is authorized by MDOC Policy Directive. .03.02.130 (Ex#11 [PD-03.02.130 Eff / /04]).

25. In October 21, 2007,plaintiff appealed to Step II in ICF-07-07-1166 and 1167 seeking that the "Notice of Intent be forwarded to conduct an administrative hearing." Plaintiff also contacted defendant Olger supervisor, defendant Norman asking that the warranty replacement radio be held until the outcome of the appeals or a Notice of Intent arrive from defendant Embry. defendant Norman agreed. Within the authority of PD-04.07.112.

26. Pursuant to MDOC authority in Policy Directive .04.07.112 which states in relevant part:

> " . . contraband property shall not be disposed of until after the prisoner has exhausted available administrative remedies (e.g. grievance process.)"

27. This feature was ignored by defendant Olger.

28. Plaintiff received Step II Appeals back in ICF-07-07-1166 and 1167 by Warden Willie O. Smith, said Warden, informed plaintiff that the "information will be forwarded to the location where plaintiff is now locking." (Ex #12 [ICF-07-07-1166 Step II response] Ex#13 [ICF-07-07-1167 Step II response]).

29. This information was shared with defendant is Norman and Olger.

30. In a December 5, 2007 memo, defendant Norman informed plaintiff that the warranty replacement radio that "no action will be

taken until sufficient information is received." As stated in the November 2007 memo filing said defendant.

31. In May 2008,defendant Embry, still had not forwarded any documentation, nor Notice of Intent. defendant Olger destroyed plaintiff's personally owned radio. Under the ruse that plaintiff had not appealed to Step II. Regardless of the Ste I and Step II favorable responses.

16. Plaintiff filed a grievance at LMF against defendants Olger and Norman for the arbitrary destruction of plaintiff's personally owned radio. That this style of radio' i.e., Super III AM/FM radio is not longer sold in the MDOC (Ex#14 [LMF-08-05-2543, Step I, II & III w/memo response Step II]).

CLAIMS FOR RELIEF

CAUSE OF ACTION

33. Plaintiff re-alleges and incorporates herein paragraph 1 through 32.

34. Plaintiff has a Constitutional Right to receive warranty replacement appliances that is and/or once on the MDOC approved standardize appliance list and the Magnous-Moss Warranty Act and Michigan Protection Consumer Act.

35. Defendant Dykehouse, violated his Constitutional Right by arbitrarily refusing and/or failing to turn over the radio at the adminis-

trative hearing. In violation of plaintiff's procedural due process rights, contrary to the Fourteenth Amendment of the U.S. Constitution.

CAUSE OF ACTION

36. Plaintiff re-allege and incorporates herein paragraph 1 through 32.

37. Plaintiff has under the authority of MDOC Policy Directive cited returned and received a warranty replacement that was rejected under the authority of MDOC Policy Directive – but as "mail" instead of property – then a hearing under the authority of MDOC Administrative Rule. Grieved and was to be held under the authority of MDOC Policy Directive, but destroyed.

38. Defendant Embry did not adhere to the Step II, to forward the documentation Notice of Intent under the authority of MDOC Policy Directive in violation of the procedural due process of the Fourteenth Amendment of the U.S. Constitution.

CAUSE OF ACTION

39. Plaintiff re-allege and incorporates herein paragraph 1 through 32.

40. Plaintiff has a Constitutional Right to broadcast speakers in the form of real-time entertainment and real-time free flowing information under the First Amendment of the U.S. Constitution.

41. Plaintiff has a Constitutional Right to petition the Government for redress under the establish authority of the MDOC Policy Directive, all parties are to adhered to this authority.

42. Plaintiff has a Constitutional Right to express in the form of significant medium for the communication of ideals – where a speaker exists, freedom of speech intends not only to the speaker, but also to a willing listener – of First Amendment protection.

43. When defendant Olger supported by defendant Norman destroyed plaintiff's warranty replacement Super III AM/FM Radio without providing an form of alternative under the rule of the authority of MDOC Policy Directive violated plaintiff's First Amendment to the U.S. Constitution.

RELIEF REQUESTED

WHEREFORE, plaintiff requests that the Court grant the following relief:

A. Issue a Declaration that (A) defendant Dykehouse Administrative Hearing violated plaintiff's Due Process, (B) that defendant Embry not forwarding an Notice of Intent and documentation to LMF for an second unauthorized by MDOC Policy did and would have violated Due Process; and (C) that defendant Olger and Norman violated plaintiff under the rule of MDOC Policy Authority destroyed plaintiff's First Amendment of Real-Time Entertainment and Real-Time free flowing information;.

B. Issue an Injunction requiring defendant's to replace immediately plaintiff's Super III AM/FM radio New.

C. Compensatory damages of $800.00 from all defendant's jointly, and Punitive damages of $950.00 from all defendant's jointly.

D. Other relief that this Court deem just and proper.

Respectfully submitted,

January 24, 2011, A.D.

s/ André Lee Coleman-Bey
André Lee Coleman-Bey
Plaintiff, In Pro Se

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-2419

ANDRÉ LEE COLEMAN, Plaintiff-Appellant,

v.

BRIAN SWEENEY, ARUS at Baraga Max. - in his individual and official capacities; WILLIAM LEUTZOW, Retired Former A/Deputy - in his individual and official capacities; RALPH SACKETT, RUM at Baraga Max. - in his individual and official capacities; KIMBERLY MENI, RUM at Baraga Max. - in her individual and official capacities; JANICE ANSELL, Administrative Assistant at Baraga - in her individual and official capacities; RALPH NAPEL, A/Warden and A/Deputy Warden at Marquette Branch - in his individual and official capacities; BARRY MCLEMORE, Warden, Deputy Director, Lansing - in his individual and official capacities, Defendants-Appellees.

March 29, 2011

ORDER

Before: KEITH, CLAY and KETHLEDGE, Circuit Judges.

Andre Lee Coleman, a Michigan prisoner proceedings pro se, appeals a district court judgment dismissing his civil rights complaint filed pursuant to 42 U.S.C.

§ 1983. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In August 2009, Coleman sued the Director (McLemore) of the Michigan Department of Corrections ("MDOC"), the Assistant Warden (Napel) of the Baraga Maximum Correctional Facility ("AMF"), an AMF retired Assistant Deputy (Leutzow), an AMF Administrative Assistant (Ansell), an AMF Assistant Resident Unit Manager (Sweeney), and two Resident Unit Managers (Sackett and Meni). In support of his complaint, Coleman alleged that the Ingham County Circuit Court had returned three separate pleadings and money orders sent as partial filing fees for the pleadings. Coleman claimed that he had twenty-one days to refile the pleadings and return the filing fees to the court. He acknowledged that the defendants forwarded the returned legal mail to him, but stated that prison officials had removed the money orders and refused to deposit them into his prisoner account. Coleman filed grievances concerning the legal mail and return of his money orders. Following his grievance hearings, it was determined that the mail had been handled properly.

Coleman claims that the defendants: 1) denied him access to the court; and 2) retaliated against him for filing grievances concerning the handling of his legal mail and his money orders. Coleman argued that the hearings were held to delay the return of his money orders in retaliation for exercising his rights under the grievance procedures. The district court concluded that Coleman did not state a claim for denial of access to the courts and

that he did not state a retaliation claim because he did not identify any adverse action.

Coleman has filed a timely appeal, arguing that the district court erred when it dismissed his complaint for failure to state a claim, when it concluded that he could not sue the supervisory defendants for implicitly authorizing the challenged misconduct, and when it certified that his appeal would not be well-taken. Coleman has filed a motion for the appointment of counsel.

Upon review, we conclude that the district court properly dismissed Coleman's complaint. We review de novo a district court's decision to dismiss under 28 U.S.C. § 1915(e)(2). *See Grinter v. Knight*, 532 F.3d 567, 571-72 (6th Cir. 2008).

Coleman did not state a claim for denial of access to the courts. While inmates have the right to petition the government for the redress of grievances, *see Bounds v. Smith*, 430 U.S. 817, 821-24 (1977), no such claim exists unless the inmate sought to file a non-frivolous challenge to his conviction or conditions of confinement. *See Lewis v. Casey*, 518 U.S. 343, 355 (1996). Thus, a prisoner must allege that he has suffered an actual injury in order to state a claim. *See id.* at 349. Where an inmate alleges that prison officials have denied him access to the courts, that inmate must show that the officials have somehow interfered with his presentation or filing of a non-frivolous claim. *See id.* at 350.

Coleman has not sufficiently alleged any such interference in this case. Coleman did not identify the basis of the underlying lawsuits, relate the facts supporting them, or allege that his claims were "non-frivolous." Furthermore, although Coleman indicates that the failure to return his money orders delayed his ability to

send the partial filing fees to the Ingham County Court, he did not state that his law suits had been dismissed. Therefore, Coleman did not allege that the defendants' conduct caused him any "actual injury" with respect to his lawsuits.

The district court also properly concluded that Coleman failed to state a retaliation claim. A retaliation claim has three elements: 1) the prisoner engaged in protected conduct; 2) an adverse action was taken against the prisoner that would deter a person of ordinary firmness from continuing to engage in that conduct; and 3) a causal connection exists between the first two elements, i.e., the prisoner's protected conduct motivated at least in part the adverse action. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc).

Coleman failed to identify any adverse action taken against him. Coleman's assertion that the defendants retaliated against him by holding hearings on his grievances is spurious. The hearings were meant to provide him with an opportunity to present his claims concerning the challenged misconduct. Hence, the district court properly dismissed this claim.

Contrary to Coleman's arguments, the district court properly dismissed Coleman's claims against defendants McLemore, Napel, Leutzow, and Ansell because these defendants were not personally involved in the alleged misconduct. Defendants McLemore, Napel, Leutzow, and Ansell cannot be held liable because the doctrine of respondeat superior does not apply in § 1983 lawsuits to impute liability onto supervisory personnel. *See Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 691 (1978). Coleman's self-serving and conclusory statement that the defendants implicitly authorized and condoned the

alleged misconduct is insufficient to establish that they were personally involved.

Accordingly, we deny the motion for the appointment of counsel and affirm the district court's judgment. *See* Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Clerk

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
DEC - 1 2014
OFFICE OF THE CLERK

No. 13-1333

In the Supreme Court of the United States

ANDRÉ LEE COLEMAN,
A/K/A ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

TODD TOLLEFSON, ET AL.

ANDRÉ LEE COLEMAN, PETITIONER

v.

BERTINA BOWERMAN, ET AL.

ANDRÉ LEE COLEMAN, PETITIONER

v.

STEVEN DYKEHOUSE, ET AL.

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v.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, under the "three strikes" provision of the Prison Litigation Reform Act, 28 U.S.C. 1915(g), a district court's dismissal of a lawsuit counts as a strike while it is still pending on appeal or before the time for seeking appellate review has passed.

PARTIES TO THE PROCEEDING

Pursuant to Rule 12.4, this Court granted a single petition for a writ of certiorari to review the judgments in four underlying cases. Petitioner in each of the four cases is André Lee Coleman, also known as André Lee Coleman-Bey.

Respondents in *Coleman* v. *Tollefson* are Todd Tollefson, Mary Aho, James G. Armstrong, Joseph Bouchard, William Luetzow, and Kimberly Mieni.

Respondents in *Coleman* v. *Bowerman* are Bertina Bowerman, Mary Boneville, and Kimberly Hill.

Respondents in *Coleman* v. *Dykehouse* are Steven Dykehouse, Ronald T. Embry, Sam Norman, and Debra Olger.

Respondents in *Coleman* v. *Vroman* are Aaron J. Vroman and Mary E. Fate.

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ON WRIT OF CERTIORARI
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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals in *Coleman* v. *Tollefson* (Pet. App. 1a-14a) is reported at 733 F.3d 175. The relevant orders of the court of appeals in *Coleman* v. *Bowerman* (Pet. App. 26a-29a), *Coleman* v. *Dykehouse* (Pet. App. 36a-39a), and *Coleman* v. *Vroman* (Pet. App. 46a-49a) are unreported. The opinions of the district courts in all four cases (Pet. App. 17a-25a, 32a-35a, 42a-45a, 52a-54a) are unreported.

JURISDICTION

The judgment of the court of appeals in *Tollefson* was entered on October 23, 2013. A petition for rehearing was denied on January 17, 2014 (Pet. App. 15a-16a). The relevant orders of the court of appeals in *Bowerman*, *Dykehouse*, and *Vroman* were entered on January 10, 2014. On March 27, 2014, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including May 12, 2014. The petition for a writ of certiorari was filed on May 5, 2014, and was granted on October 2, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1915(g) of Title 28 of the United States Code provides as follows:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

The federal *in forma pauperis* statute, 28 U.S.C. 1915, is reprinted in full in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

The "three strikes" provision of the Prison Litigation Reform Act, 28 U.S.C. 1915(g), generally prohibits a prisoner from proceeding *in forma pauperis* in federal court if "the prisoner has, on 3 or more prior occasions, while incarcerated * * *, brought an action or appeal

in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." This case presents the question whether a district court's dismissal of a lawsuit on one of the enumerated grounds counts as a strike for purposes of Section 1915(g) while it is still pending on appeal and therefore subject to reversal or modification.

In each of the four underlying cases that were the subject of the petition for certiorari, petitioner, a Michigan state prisoner, filed a civil-rights action in federal court and moved for leave to proceed *in forma pauperis* while a dismissal that would otherwise have qualified as his third strike was still on appeal. In each case, the district court denied petitioner's motion. Pet. App. 17a-25a, 32a-35a, 42a-45a, 52a-54a.

In the first of the underlying cases, *Tollefson*, the Sixth Circuit affirmed. Pet. App. 1a-14a. In a divided opinion, the Sixth Circuit held, contrary to the holdings of seven other courts of appeals (and dicta from three others), that a district court's dismissal immediately counts as a strike for purposes of the PLRA's "three strikes" provision, even if the dismissal was on appeal when the instant action was commenced. Relying on its decision in *Tollefson*, the Sixth Circuit subsequently denied petitioner *in forma pauperis* status in the other cases. Pet. App. 26a-29a, 36a-39a, 46a-49a. The Sixth Circuit's interpretation of the "three strikes" provision was incorrect, and its judgments should therefore be reversed.

A. Background

1. Originally enacted in 1892, the federal *in forma pauperis* statute is "designed to ensure that indigent litigants have meaningful access to the federal courts."

Neitzke v. *Williams*, 490 U.S. 319, 324 (1989) (citation omitted). In its original form, the statute provided that any citizen "may commence and prosecute to conclusion" a lawsuit in federal court "without being required to prepay fees or costs, or give security therefor before or after bringing suit," upon filing an affidavit stating that he was unable to do so. Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252. In enacting the statute, Congress "intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, * * * solely because his poverty makes it impossible for him to pay or secure the costs." *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342 (1948).

2. Congress most recently amended the *in forma pauperis* statute in 1996 as part of the Prison Litigation Reform Act (PLRA). See Pub. L. No. 104-134, § 804, 110 Stat. 1321-73 to 1321-75. Lawsuits by prisoners accounted for a disproportionate share of civil filings in federal court. *Jones* v. *Bock*, 549 U.S. 199, 203 (2007). In the PLRA, Congress sought to "address[] th[e] challenge" of "ensuring that the flood of nonmeritorious claims [by prisoners] does not submerge and effectively preclude consideration of the allegations with merit." *Ibid.* Congress therefore enacted a variety of reforms designed to "filter out" nonmeritorious prisoner claims while "facilitat[ing] consideration" of meritorious ones, consistent with our legal system's "guarantee[] that prisoner claims of illegal conduct by their custodians are fairly handled according to law." *Id.* at 203-204.

To that end, the PLRA made numerous changes to the way in which federal courts process lawsuits by prisoners. For example, the PLRA requires a district court faced with a lawsuit by a prisoner to review the complaint as soon as practicable—even before docketing, if feasible—to determine whether the complaint should be

dismissed. See 28 U.S.C. 1915A. The PLRA also requires a prisoner to exhaust any available administrative remedies before bringing suit in federal court. See 42 U.S.C. 1997e.

The PLRA amended the federal *in forma pauperis* statute, 28 U.S.C. 1915, in at least two important ways. First, the PLRA imposed specific obligations to pay filing fees on prisoners who qualify for *in forma pauperis* status. Under new subsection (b), unlike other individuals who qualify for *in forma pauperis* status, a prisoner who has any assets is required to pay an initial installment of 20% of his average monthly income (or the average balance in his account, if greater), followed by similar monthly installments until the entire fee is paid. 28 U.S.C. 1915(b).

Second, and of particular relevance here, the PLRA added what has come to be known as the "three strikes" provision. That provision, codified in new subsection (g), prohibits a prisoner from proceeding *in forma pauperis* in federal court if "the prisoner has, on 3 or more prior occasions, while incarcerated * * *, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted," unless the prisoner is in imminent physical danger. 28 U.S.C. 1915(g).[1] In most instances, therefore, a prisoner who has accumulated three so-called "strikes" (*i.e.*, qualifying "dismiss[als]" on "prior occasions") is barred from proceeding with any civil action or appeal in federal court unless he first pays the full amount of the filing fee,

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[1] After the enactment of the PLRA, a number of States adopted similar "three strikes" provisions. See, *e.g.*, Okla. Stat. tit. 57, § 566.2(A); 42 Pa. Cons. Stat. § 6602(f).

currently set at $400 for a complaint (including a $50 administrative fee) and $505 for a notice of appeal (including a $5 docketing fee). See 28 U.S.C. 1914(a), 1917; United States Courts, District Court Miscellaneous Fee Schedule ¶ 14 (Dec. 1, 2013) <tinyurl.com/dctfees>; United States Courts, Court of Appeals Miscellaneous Fee Schedule ¶ 1 (Dec. 1, 2013) <tinyurl.com/usca-fees>.[2]

B. Facts And Procedural History

1. Petitioner is an inmate in a Michigan state prison. He has been incarcerated since 1983, when he was convicted of armed robbery and related offenses. On December 3, 2010, petitioner filed a civil-rights action in the United States District Court for the Western District of Michigan under 42 U.S.C. 1983 against Todd Tollefson and five other Baraga employees, asserting, *inter alia*, that they had violated his constitutional rights by interfering with his access to the courts. J.A. 119-136. He moved for leave to proceed *in forma pauperis*. Pet. App. 2a, 17a.

Citing the "three strikes" provision, the district court denied petitioner's motion. Pet. App. 17a-20a. The district court identified three lawsuits that had been filed by petitioner and dismissed by federal district courts. *Id.* at 19a. As to the first of those lawsuits, *Coleman* v. *Lentin*, petitioner filed the complaint, and the district court ordered dismissal, in 1992. J.A. 45. As to the second of those lawsuits, *Coleman* v. *Kinnunen*, petitioner filed the complaint in 2005. The district court initially dis-

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[2] The foregoing provisions of Section 1915 do not apply to proceedings in this Court; *in forma pauperis* status in this Court is generally governed by Rule 39. See, *e.g.*, *Martin* v. *District of Columbia Court of Appeals*, 506 U.S. 1, 2-3 (1992) (per curiam).

missed for failure to state a claim, but the court of appeals vacated in part and remanded for further proceedings. The district court granted a renewed motion to dismiss on remand in 2008. J.A. 46-49. And of particular note for present purposes, as to the third of those lawsuits, *Coleman* v. *Sweeney*, petitioner filed the complaint in 2009. The district court dismissed for failure to state a claim in October 2009, but petitioner appealed. J.A. 53-65, 160-164. Based on its determination that the dismissals in *Lentin*, *Kinnunen*, and *Sweeney* counted as strikes, the district court denied petitioner *in forma pauperis* status. Pet. App. 19a.[3]

Petitioner moved for reconsideration in the district court, arguing, as is relevant here, that the dismissal in *Sweeney* could not count as a strike because it was still pending on appeal when petitioner filed the instant complaint (and, for that matter, when the district court denied him leave to proceed *in forma pauperis*).[4] The district court denied the motion. Pet. App. 21a-25a. The court concluded that "a dismissal counts as a strike even if it is pending on appeal at the time that the plaintiff files his new action." *Id.* at 24a. In the court's view, "a judgment of dismissal by a district court is final and

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[3] The district court noted that petitioner did not qualify for the exception to the "three strikes" rule because he did not allege that he was in imminent physical danger. Pet. App. 19a-20a.

[4] The court of appeals affirmed the dismissal in *Sweeney* on March 29, 2011—not only after petitioner filed the complaint in *Tollefson*, but also (contrary to the court of appeals' opinion in *Tollefson*, see Pet. App. 7a) after the district court denied petitioner's motion for leave to proceed *in forma pauperis* in *Tollefson* on February 15, 2011. Petitioner did not petition this Court for review of the court of appeals' decision affirming the dismissal in *Sweeney*, and his time to do so expired on June 27, 2011.

should be given full effect, unless stayed upon appeal." *Id.* at 23a.

Because of the denial of *in forma pauperis* status, petitioner was unable to pursue his claims, and the district court dismissed for want of prosecution. The court, however, did grant petitioner leave to proceed *in forma pauperis* for purposes of appeal. Pet. App. 2a.

2. A divided court of appeals affirmed, holding that a district court's dismissal of a lawsuit counts as a strike for purposes of Section 1915(g) even if it was still on appeal at the time the instant action was commenced. Pet. App. 1a-14a.

a. The court of appeals reasoned that, because Section 1915(g) "does not say that the dismissal must be final in all of the courts of the United States," a district court's dismissal immediately counts as a strike even if it is still pending on appeal. Pet. App. 4a (citation omitted). The court explained that such an approach was "consistent with how judgments are treated for purposes of res judicata," because "cases on appeal have preclusive effect until they are reversed or vacated." *Id.* at 5a.

The court of appeals acknowledged that the vast majority of circuits to have considered the issue had held that a "dismissal does not count as a strike until the litigant has exhausted or waived his appellate rights." Pet. App. 5a (citing *Henslee* v. *Keller*, 681 F.3d 538 (4th Cir. 2012); *Silva* v. *Di Vittorio*, 658 F.3d 1090 (9th Cir. 2011); *Smith* v. *Veterans Administration*, 636 F.3d 1306 (10th Cir.), cert. denied, 132 S. Ct. 381 (2011); *Chavis* v. *Chappius*, 618 F.3d 162 (2d Cir. 2010); *Nicholas* v. *American Detective Agency*, 254 Fed. Appx. 116 (3d Cir. 2007) (per curiam); *Thompson* v. *DEA*, 492 F.3d 428 (D.C. Cir. 2007); *Campbell* v. *Davenport Police Department*, 471 F.3d 952 (8th Cir. 2006) (per curiam); and *Adepegba* v. *Hammons*, 103 F.3d 383 (5th Cir. 1996)). The court of

appeals, however, rejected the analysis of those courts. *Id.* at 5a-6a.

In particular, the court of appeals rejected as "unfounded" the concern expressed by some courts that immediately counting a district court's dismissal as a strike "would preclude the prisoner from pursuing the appeal of [a third] dismissal in forma pauperis." Pet. App. 5a-6a. The court of appeals reasoned that such an "anomalous result" would not occur because a dismissal that is pending on appeal "is not a *prior* occasion for purposes of that appeal" within the meaning of the statute. *Id.* at 6a. The court of appeals explained that, although a district court's dismissal immediately counts as a strike, the appeal of that dismissal "is the *same* occasion" and thus would not be subject to the "three strikes" provision. *Ibid.*

Based on that reasoning, the court of appeals determined that the dismissal at issue in petitioner's case "counted as a strike continually from when it was entered," despite petitioner's pending appeal. Pet. App. 7a. Because the dismissal occurred before petitioner filed the instant complaint, the court of appeals upheld the district court's denial of *in forma pauperis* status. *Ibid.*

b. Judge Daughtrey dissented. Pet. App. 7a-14a. She described as "both more compelling and more fair" "the reasoning that has led the great majority of circuits to conclude that dismissals count as strikes under the PLRA only when those dismissals have become final—*i.e.*, when the plaintiff has exhausted or waived his appellate rights." *Id.* at 9a. She rejected the panel majority's contention that "the majority rule distorts the plain meaning of the PLRA." *Ibid.* As she noted, "[S]ection 1915(g) does not expressly state whether a prior dismissal of 'an action or appeal' must be final before it can be considered a 'strike.'" *Ibid.* (citation omitted). Instead,

"the statute is ambiguous, not only with respect to when dismissals should count as strikes but also with respect to what counts as a 'prior occasion.'" *Ibid.*

Construing Section 1915(g) "in light of its history and purpose," Judge Daughtrey reasoned that "Congress could not have intended that dismissals would count as strikes immediately, given Congress's concern with fostering meritorious prisoner suits and preventing frivolous ones." Pet. App. 10a. She explained that the panel majority's interpretation "could potentially bar the filing of meritorious claims * * * by preventing prisoners from bringing claims in federal court while one or more of their first three dismissals were being reversed on appeal." *Id.* at 10a-11a.

Because Judge Daughtrey would have held that "dismissals of causes of action do not count as strikes under the PLRA until the prisoner-plaintiffs have exhausted or waived their appeals," she proceeded to consider "at precisely what point in the litigation process the finality of any prior dismissals should be assessed." Pet. App. 12a. In light of the relevant statutory language and the approach taken by other courts, Judge Daughtrey would have assessed the finality of potential strikes as of the date of the filing of the complaint. *Id.* at 13a. Because the dismissal at issue was still pending on appeal when petitioner filed the instant complaint, Judge Daughtrey concluded that petitioner was entitled to *in forma pauperis* status. *Id.* at 13a-14a.

c. The court of appeals subsequently denied rehearing en banc. Pet. App. 15a-16a. Judge Daughtrey would have granted panel rehearing. *Id.* at 16a.

3. Like *Tollefson*, the other cases that are before this Court—*Bowerman*, *Dykehouse*, and *Vroman*—were civil-rights actions filed by petitioner in the Western District of Michigan under Section 1983. In each case, as in

Tollefson, the dismissal that would have qualified as the third strike was still on appeal when the instant complaint was filed. Pet. App. 34a, 44a, 53a. And the district court denied petitioner *in forma pauperis* status on materially identical reasoning to that in *Tollefson*. *Id.* at 33a-35a, 43a-45a, 52a-53a.

In each case, as in *Tollefson*, petitioner was unable to pursue his claims because of the district court's denial of *in forma pauperis* status, and the district court dismissed for want of prosecution. Unlike in *Tollefson*, however, the district court also denied petitioner leave to proceed *in forma pauperis* for purposes of appeal. Pet. App. 27a, 37a, 47a.

As a result, in each case, petitioner had to apply to the court of appeals for leave to proceed *in forma pauperis* on appeal. Relying on its decision in *Tollefson*, the court of appeals issued materially identical orders in each case denying petitioner's motion for leave to proceed *in forma pauperis* on appeal. Pet. App. 26a-29a, 36a-39a, 46a-49a. The court cited *Tollefson* for the proposition that "a dismissal of a case for failure to state a claim qualifies as a 'strike' even if the appeal from the dismissal is pending at the time a prisoner files a new complaint." *Id.* at 28a, 38a, 48a (citing *id.* at 4a). The court of appeals then dismissed each appeal for want of prosecution. *Id.* at 30a-31a, 40a-41a, 50a-51a.

SUMMARY OF ARGUMENT

This is a case where statutory ambiguity can be resolved with a modicum of common sense. The PLRA's "three strikes" provision, 28 U.S.C. 1915(g), bars a prisoner from bringing any civil action without prepaying the full amount of the filing fee if the prisoner has accumulated three qualifying dismissals under the statute. Section 1915(g), however, does not specifically address

the question of *when* a dismissal counts: specifically, whether a dismissal immediately counts as a strike, or whether it counts only once it has become final on appeal. The text and underlying purposes of the PLRA, as well as considerations of workability and administrability, support the latter interpretation. Accordingly, that interpretation has been adopted by the vast majority of the courts of appeals to have considered the issue. The Sixth Circuit, however, adopted the contrary interpretation, based on faulty reasoning and a false assurance that it could avoid some of the anomalies that such an interpretation inevitably creates. The Sixth Circuit's outlying interpretation should be rejected.

A. The better reading of the text of Section 1915(g) is that a dismissal does not count as a strike until it becomes final on appeal. While the text is not free of ambiguity on the specific timing question presented here, it is more consistent with an interpretation that counts as strikes only dismissals that have become final on appeal. A strike accumulates when a qualifying "dismiss[al]" occurs on a "prior occasion[]." As the Sixth Circuit itself recognized, a district court's dismissal and the ensuing appeal from that dismissal constitute a single "occasion" for purposes of the statute. A strike flowing from that "occasion" thus cannot accumulate until the appeal has run its course.

That interpretation is also entirely consistent with the PLRA's underlying purposes. It is plain from the text itself that Congress intended to penalize only prisoner litigation that is "frivolous, malicious, or fails to state a claim upon which relief may be granted." Enforcing the "three strikes" bar against a prisoner on account of a dismissal that is still pending on appeal, however, poses a risk of punishing litigation that turns out to be meritorious. The PLRA was intended to strike a balance

between filtering out frivolous claims by prisoners and facilitating judicial consideration of meritorious claims. Those purposes are better served by an interpretation that allows for meaningful appellate review of potential strikes before cutting off a prisoner's access to *in forma pauperis* status.

B. In light of the PLRA's concern with promoting judicial efficiency, considerations of workability and administrability strongly support the majority interpretation. If a strike were assessed immediately upon a district court's dismissal, a later reversal could cause a prisoner to *lose* a strike. The resulting fluid approach to strike counting would introduce needless uncertainty and complexity into the *in forma pauperis* determination. Nothing in the statute suggests that Congress intended that approach. Aside from making little sense, that approach would be difficult to administer and would confuse litigants. Waiting until a dismissal is final on appeal before assessing a strike—the rule followed by a majority of the courts of appeals—avoids those complexities: under that approach, once a prisoner has accumulated three strikes, he is barred for good. The majority interpretation also avoids the serious and widely recognized problem that the immediate counting of a dismissal as a strike would effectively preclude appellate review of a third dismissal by denying the prisoner *in forma pauperis* status on appeal. If Congress had intended such a harsh and unusual result, it surely would have said so clearly.

C. In the decision below, the Sixth Circuit attempted to mitigate the harshness of its interpretation by holding that a district court's dismissal could be counted as a strike against a successive suit, but not against an appeal from the dismissal itself. The court's internally inconsistent reasoning, however, reveals the error of that ap-

proach. The Sixth Circuit correctly recognized that a district court's dismissal and the ensuing appeal are the same "occasion" for purposes of Section 1915(g). Yet it failed to realize that, for that very reason, the dismissal cannot count as a strike against a successive suit filed while it is pending on appeal, because the statutory "occasion" is still in progress. The Sixth Circuit's attempt to mitigate the harsh consequences of its interpretation thus fails. And the Sixth Circuit offered little actual support for its interpretation, other than the anodyne observations that the statute does not specifically address the timing question presented here and that the doctrine of res judicata attaches immediate consequences to district court judgments. Those observations merely highlight the ambiguity of the statute; they do not aid in resolving it.

D. The approach adopted by the Seventh Circuit—the only other court of appeals to have held that a district court's dismissal immediately counts as a strike—fares no better. In its own effort to mitigate the harshness of its interpretation, the Seventh Circuit created a procedure whereby a prisoner could ask the court of appeals for leave to proceed *in forma pauperis* on appeal from a third-strike dismissal under Federal Rule of Appellate Procedure 24(a)(5), and the court, in considering that request, could review the merits of the underlying dismissal. Not only is that approach at odds with the rule, but it also cannot be reconciled with the Seventh Circuit's own interpretation of Section 1915(g), under which a prisoner in that situation would already have three strikes, thus barring the court of appeals from granting him *in forma pauperis* status and reviewing the dismissal. The Seventh Circuit's proposed workaround would also unnecessarily multiply the complexity

and effort associated with determining whether a prisoner is entitled to proceed *in forma pauperis*.

E. The Sixth Circuit's erroneous interpretation of Section 1915(g) should be corrected and its judgments reversed. Because the dismissal that would have counted as petitioner's third strike was still pending on appeal when he submitted each of the underlying complaints in the district court, the Sixth Circuit erred in holding that he was not entitled to *in forma pauperis* status in those cases. The Sixth Circuit's judgments should therefore be reversed, thereby enabling petitioner to proceed *in forma pauperis* on remand in the district court.

ARGUMENT

UNDER THE PLRA'S 'THREE STRIKES' PROVISION, A DISTRICT COURT'S DISMISSAL OF A LAWSUIT DOES NOT COUNT AS A STRIKE UNTIL IT BECOMES FINAL ON APPEAL

This case presents a straightforward question of statutory interpretation. The PLRA's "three strikes" provision, 28 U.S.C. 1915(g), bars a prisoner from bringing any civil action without prepaying the full amount of the filing fee if the prisoner has accumulated three qualifying dismissals under the statute. The question presented by this case is *when* a district court's dismissal of a lawsuit counts as a strike for purposes of Section 1915(g). The vast majority of the courts of appeals have held that a district court's dismissal counts as a strike only once it becomes final on appeal—not while it is still pending on appeal or before the time for seeking appellate review has passed. The Sixth Circuit in this case erred by holding that a district court's dismissal immediately counts as a strike, even if that dismissal could still be reversed or modified on appeal. This Court should

adopt the majority interpretation and reverse the Sixth Circuit's judgments.

A. The Text And Underlying Purposes Of The PLRA Indicate That A Dismissal Counts As A Strike Only Once It Becomes Final On Appeal

The text of Section 1915(g) does not expressly address the question of when a dismissal should count as a strike. The better reading of the text, however, is that a dismissal does not count as a strike until it becomes final on appeal. That interpretation fully accords with the underlying purposes of the PLRA, which was intended to strike a balance between penalizing truly meritless lawsuits and fostering meritorious ones. The Sixth Circuit erred when it adopted a contrary interpretation, based only on the most cursory analysis of the statutory text.

1. As this Court has repeatedly noted, the "first step" in interpreting a statute is to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). In determining whether statutory language is unambiguous, this Court looks to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341.

Although Section 1915(g) plainly applies once a prisoner has accumulated three qualifying dismissals under the statute, it does not address the implications of appellate review on such a dismissal. As is relevant here, Section 1915(g) does not specifically address the timing question of *when* a dismissal counts: in particular, whether a dismissal counts as a strike while it is still pending on appeal. Instead, the statute simply states that a prisoner who, "on 3 or more prior occasions, * * * brought an action or appeal * * * that was dismissed on the grounds that it is frivolous, malicious,

or fails to state a claim upon which relief may be granted," cannot be afforded *in forma pauperis* status absent "imminent danger of serious physical injury." Where a statute "says nothing explicitly" about the issue in question, "such silence * * * normally creates ambiguity[;] [i]t does not resolve it." *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002); see also *Regions Hospital* v. *Shalala*, 522 U.S. 448, 458 (1998) (concluding that the statute at issue was "silent on the matter of time, and therefore * * * ambiguous").[5]

What is more, Section 1915(g) does not define either of the phrases that potentially bear on the timing question presented here, "prior occasion[]" or "dismiss[al]." As to "prior occasion[]," that phrase is open to multiple interpretations. It "may refer to a single moment or to a continuing event: to an appeal, independent of the underlying action, or to the continuing claim, inclusive of both the action and its appeal." *Henslee* v. *Keller*, 681 F.3d 538, 542 (4th Cir. 2012). Similarly, as to "dismiss[al]," Section 1915(g) is silent about the impact of subsequent proceedings on an otherwise qualifying dismissal. Where, for example, a district court's dismissal of an action is reversed on appeal, the action is thereby

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[5] In 2000, Congress enacted a similar "three strikes" provision relating to civil forfeiture. See Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 2, 114 Stat. 210. That provision bars a prisoner from filing a claim under a civil-forfeiture statute, or appealing a judgment in an action based on a civil-forfeiture statute, if the prisoner has, on three or more prior occasions, brought an action or appeal that was dismissed as frivolous or malicious, except in "extraordinary and exceptional circumstances." 18 U.S.C. 983(h)(3). Although the relevant language in that "three strikes" provision is materially identical to that of Section 1915(g), there appears to be no case law addressing the question of when a dismissal counts as a strike under that statute.

reinstated—with the result that the action arguably can no longer be described as "dismissed." See *Adepegba* v. *Hammons*, 103 F.3d 383, 387 (5th Cir. 1996). Thus, Section 1915(g) is ambiguous with regard to when an otherwise qualifying dismissal counts as a strike—and, specifically, whether a dismissal counts while it is still pending on appeal and therefore subject to reversal or modification. See, *e.g.*, *Ball* v. *Famiglio*, 726 F.3d 448, 464-465 (3d Cir. 2013), cert. denied, 134 S. Ct. 1547 (2014); *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1098 (9th Cir. 2011); Pet. App. 9a (Daughtrey, J., dissenting).

2. Although the text is not free of ambiguity, the better reading of Section 1915(g) is that a dismissal does not count as a strike until it becomes final on appeal.

The term "strike" does not appear in Section 1915(g). Instead, Section 1915(g) refers to "3 or more prior occasions" on which "an action or appeal * * * was dismissed" for failure to state a claim (or on one of the other enumerated grounds).[6] Under the plain language of the statute, and as lower courts have consistently recognized, where a district court issues an otherwise qualifying dismissal, a court of appeals' *affirmance* of that dismissal does not count as a distinct strike; only a qualifying *dismissal* of the appeal would do so. See, *e.g.*, *Ball*, 726 F.3d at 464; *Taylor* v. *First Medical Management*, 508 Fed. Appx. 488, 494-495 (6th Cir. 2012); *Thompson* v. *DEA*, 492 F.3d 428, 436-437 (D.C. Cir. 2007); *Jennings* v. *Natrona County Detention Center Medical Facility*, 175 F.3d 775, 780 (10th Cir. 1999); *Adepegba*, 103 F.3d at 387. It therefore naturally follows that a district court's dis-

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[6] As lower courts have explained, "strike" is simply the vernacular term for a qualifying "dismiss[al]" on a "prior occasion[]." See, *e.g.*, *Patton* v. *Jefferson Correctional Center*, 136 F.3d 458, 463 n.8 (5th Cir. 1998); *Jennings*, 175 F.3d at 778-779.

missal and the ensuing appeal from that dismissal constitute a single unit—or, in the language of Section 1915(g), a single "occasion." See *Henslee*, 681 F.3d at 543.[7]

If a district court's dismissal and the ensuing appeal constitute a single "occasion," moreover, the strike flowing from that "occasion" cannot occur until the appeal has completed. The Sixth Circuit's interpretation would incongruously count a dismissal as a strike while the "occasion" is still in progress. It is far more logical, and consistent with the statutory text, to count a dismissal as a strike only after the "occasion" is complete: *i.e.*, when the appeal from the dismissal has run its course.

3. The PLRA's underlying purposes, as expressed in the text and legislative history, support the conclusion that Congress did not intend for a dismissal to count as a strike against a prisoner until it becomes final on appeal. To begin with, it is plain from the text itself that Congress intended the "three strikes" provision to penalize only prisoner litigation that is "frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. 1915(g). And the penalty imposed for filing such litigation is severe: the denial in future actions, absent "imminent danger," of even the modified *in forma pauperis* status available to prisoners—which, for most prisoners, serves as an effective bar to the filing of future actions, however meritorious. *Ibid.*

Like the text, the legislative history of the PLRA reflects Congress' intention to "filter out the bad claims and facilitate consideration of the good": that is, to limit truly meritless claims by prisoners without preventing

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[7] By contrast, where the court of appeals issues a qualifying dismissal of the appeal, that dismissal (and any subsequent review proceedings) would constitute a distinct "occasion."

meritorious claims from being heard. *Jones* v. *Bock*, 549 U.S. 199, 203-204 (2007). As one of the PLRA's sponsors explained, "I do not want to prevent inmates from raising legitimate claims," and "this legislation will not prevent those claims from being raised." 141 Cong. Rec. 35,797 (1995) (Sen. Hatch); see also 141 Cong. Rec. 38,276 (1995) (Sen. Kyl) (stating that the PLRA "will free up judicial resources for claims with merit by both prisoners and nonprisoners").

Counting a dismissal as a strike while it is still pending on appeal poses "a risk of inadvertently punishing nonculpable conduct," contrary to Congress's purposes in enacting the PLRA. *Adepegba*, 103 F.3d at 387. As long as a prisoner is appealing from a dismissal on one of the enumerated grounds in Section 1915(g), the possibility remains that the court of appeals will conclude the district court erred in dismissing the prisoner's suit on that ground. But if a strike were assessed against the prisoner immediately upon the district court's dismissal and were then used to prevent him from proceeding *in forma pauperis*, the prisoner would be penalized for conduct that Congress never intended to reach.

Instead, the interpretation of the "three strikes" provision that most faithfully hews to Congress's purposes is the one that waits until appellate review is complete before counting a dismissal as a strike. Consistent with Congress's purpose of limiting truly meritless prisoner litigation, that interpretation counts as strikes all final dismissals on the grounds enumerated in Section 1915(g). And consistent with Congress's purpose of facilitating meritorious litigation, that interpretation allows for plenary appellate review of erroneous district court dismissals. Especially in light of the numerous other restrictions imposed by the PLRA, withholding a strike for the period of time necessary for appellate review poses

little threat of unleashing the flood of frivolous complaints that inspired the PLRA, while it ensures that meritorious complaints are not erroneously swept away.

In the decision below, the Sixth Circuit made no effort to reconcile its interpretation with the PLRA's underlying purposes—and little effort to reconcile it with the statutory text. See pp. 27-31, *infra*. This Court should instead adopt the interpretation of the vast majority of circuits to have considered the issue, and reject the Sixth Circuit's cramped approach.

B. Counting A Dismissal As A Strike Only Once It Becomes Final On Appeal Is An Administrable Rule That Accords With Common Sense And Avoids Anomalous Results

In interpreting a statute that governs the processing of lawsuits by federal courts, this Court should attach particular weight to considerations of workability and administrability. Cf. *Hertz Corp.* v. *Friend*, 559 U.S. 77, 80 (2010) (noting that, in interpreting a jurisdictional statute, the Court has "place[d] primary weight upon the need for judicial administration * * * to remain as simple as possible"). Here, those considerations strongly counsel in favor of counting a dismissal as a strike only once it becomes final on appeal. An analysis of those considerations also exposes some of the unavoidable problems with a contrary interpretation.

1. To state the obvious, under the PLRA's "three strikes" provision, strikes accumulate against a prisoner over time. Like a batter in baseball, once a prisoner reaches three strikes, he's out. The whole point of the statute is to cut off access to *in forma pauperis* status once the prisoner reaches a certain point—*i.e.*, three strikes. From that point forward, a prisoner is barred from proceeding *in forma pauperis*, subject only to the "imminent danger" exception, for as long as he is de-

tained. See 28 U.S.C. 1915(h). Counting a dismissal as a strike only once it becomes final on appeal accords with that understanding: once a dismissal becomes final on appeal, it is permanently a strike and counts toward the three strikes that trigger application of the provision.

By contrast, if a district court's dismissal immediately counted as a strike against a prisoner, a later reversal on appeal could cause a prisoner to *lose* a strike: that is, to go from three strikes to two (or even fewer). The Sixth Circuit did not dispute, and respondents have conceded, that the reversal of a dismissal would remove the erroneous strike. See Br. in Opp. 7-8. Under the Sixth Circuit's approach, therefore, it appears that the rule would be three strikes and you're out—for now.[8] Nothing in the statute suggests that Congress contemplated such a fluid approach to strike counting. Nor can such an approach be reconciled with the underlying premise of the "three strikes" provision discussed above: namely, that, once a prisoner reaches three strikes, he is barred from claiming *in forma pauperis* status for the rest of his incarceration.

The Sixth Circuit's dynamic approach to strike counting would have pernicious consequences, because it could bar a prisoner from proceeding *in forma pauperis* in a fourth, potentially meritorious, lawsuit where a district court's dismissal that counts as a third strike is later reversed or modified on appeal. In the time that it takes the court of appeals to act, the limitations period could

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[8] In the modern era, a more accurate rendition might be: three strikes, you're out, and the game goes on while the instant replay is being reviewed. But see Major League Baseball, *Replay Review Regulations* (June 30, 2014) <tinyurl.com/replayrules> (providing that balls-and-strikes calls are not reviewable, at least for now, by instant replay).

run on any claims in the fourth suit and thus bar the prisoner from pursuing the claims in that suit altogether.

To take this case as an example, the dismissal that constituted the third strike was pending on appeal for some seventeen months. See J.A. 53-65, 160-164. In that amount of time, the limitations period for prisoner civil-rights claims would have run in some jurisdictions, see, *e.g.*, Ky. Rev. Stat. Ann. § 413.140(1) (one year); Tenn. Code Ann. § 28-3-104 (same), and would nearly have run in others, see, *e.g.*, Ohio Rev. Code Ann. § 2305.10(A) (two years); Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (same); Va. Code Ann. § 8.01-243(A) (same).[9] Because there is no mechanism for deferring consideration of *in forma pauperis* status until a subsequent reversal can be taken into account when counting strikes, see pp. 34-35, *infra* (explaining that the relevant time at which the number of strikes should be assessed is when the prisoner submits the instant complaint), a prisoner would have to refile his suit—by which time he could be time-barred. The Sixth Circuit's approach would therefore bar at least some prisoners from proceeding *in forma pauperis* in a fourth, potentially meritorious, suit.

2. The Sixth Circuit's approach also introduces needless complexity and uncertainty into a statute that was intended to reduce, not increase, the courts' work in processing prisoner litigation. Under that approach, the

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[9] The limitations period for an action against state officials under 42 U.S.C. 1983 is determined by the limitations period for personal-injury claims under the law of the State where the cause of action arose. See, *e.g.*, *Wallace* v. *Kato*, 549 U.S. 384, 387 (2007). The same rule applies to actions against federal officials under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). See 14 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3655, at 302 (3d ed. Supp. 2014).

same prisoner could have three strikes one day but, because of an intervening decision on appeal, only two strikes the next.

Where a court determines that a prisoner is barred from proceeding *in forma pauperis* in a fourth suit even though a dismissal that counts as a third strike is pending on appeal, moreover, that will not necessarily be the end of the matter. Assuming that the fourth suit was dismissed without prejudice for want of prosecution, the prisoner will retain the ability to refile the suit at a later date. If he does so, and the limitations period has not yet run on his claims, the court would be required to reassess whether the prisoner has three strikes at that time—and, in the event a dismissal that previously barred the prisoner from *in forma pauperis* status was reversed or modified on appeal in the intervening period, to proceed to the merits of the prisoner's claims. To say the least, that sequence of events hardly serves the interest in judicial efficiency—one of the primary interests underlying the PLRA.

By contrast, under the majority interpretation, such problems are avoided entirely. If courts must wait until a dismissal becomes final on appeal before counting it as a strike, a prisoner who has three strikes will permanently have three strikes. Critically, a court will therefore be able to rely on a determination from a previous case that a given prisoner has three strikes when assessing the prisoner's eligibility for *in forma pauperis* status in a later case. And where a prisoner has not previously been barred from *in forma pauperis* status, a court will have to assess whether the prisoner has three strikes only once, because the court will not be confronted with the refiling of a suit in the circumstance where a prisoner goes from having three strikes to having only two.

Not only does the majority interpretation avoid the pitfalls of the Sixth Circuit's dynamic approach to strike counting, but it provides a rule that is familiar and readily administrable. Under the majority interpretation, a dismissal counts as a strike for purposes of Section 1915(g) when the prisoner has exhausted his appeals of that dismissal or when the time for seeking appellate review (including review from this Court) has run. Courts that have adopted the majority interpretation have applied that rule with no apparent difficulty; indeed, it has been the rule in the Fifth Circuit since shortly after the PLRA's enactment almost two decades ago. See, *e.g.*, *Silva*, 658 F.3d at 1100 & n.6; *Hafed* v. *Federal Bureau of Prisons*, 635 F.3d 1172, 1176-1177 (10th Cir. 2011); *Adepegba*, 103 F.3d at 388.

In a variety of other contexts, moreover, courts are required to assess whether a district court's judgment has become final on appeal—and, again, they have done so with no apparent difficulty. See, *e.g.*, *Clay* v. *United States*, 537 U.S. 522, 525 (2003) (holding that the limitations period for motions for postconviction relief under 28 U.S.C. 2255 begins to run when the conviction becomes final: that is, when "the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction"); *Griffith* v. *Kentucky*, 479 U.S. 314, 321 & n.6 (1987) (holding that the retroactivity of new constitutional rules of criminal procedure depends on whether the conviction is final: that is, whether "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"). Given the ease of applying the majority interpretation, there is simply no valid reason to burden lower courts with the complications presented by a contrary interpretation.

3. Perhaps the most troubling feature of an interpretation that requires immediately counting a district court's dismissal as a strike is that it would effectively preclude a prisoner from appealing a dismissal that would count as a third strike. That is because, if such a dismissal is immediately deemed to be a strike, a court could not grant a prisoner *in forma pauperis* status to appeal from that very dismissal, because Section 1915(g) prohibits "bring[ing] a civil action *or appeal[ing] a judgment in a civil action*" after three prior qualifying dismissals. 28 U.S.C. 1915(g) (emphasis added).

As numerous courts of appeals have recognized, by effectively depriving prisoners of the right to appeal, such an approach would "ossify district court errors"—errors that not only prevent prisoners from obtaining relief on their instant claims, but preclude them from pursuing potentially meritorious claims in other suits. *Adepegba*, 103 F.3d at 388. That outcome would be "unreasonably severe in light of congressional intent to foster meritorious prisoner lawsuits." *Henslee*, 681 F.3d at 542 n.9.

An approach that effectively eliminates the appellate function in a category of cases would also constitute a dramatic departure from ordinary practice, as the lower courts have recognized. See *Silva*, 658 F.3d at 1098; *Henslee*, 681 F.3d at 543. By statute, litigants have an appeal as of right "from all final decisions of the district courts of the United States." 28 U.S.C. 1291. If Congress had intended effectively to abrogate that right in a category of cases, "it would have clearly said so." *Thompson*, 492 F.3d at 432; see *Chavis* v. *Chappius*, 618 F.3d 162, 169 (2d Cir. 2010); see generally *Jones*, 549 U.S. at 216 (explaining, in the course of interpreting another provision of the PLRA, that, when Congress meant

to depart from the usual practice under the Federal Rules of Civil Procedure, "it did so expressly").

The fact that Congress extensively altered the preexisting rules for proceeding *in forma pauperis* as applied to prisoners, but did not state an unambiguous intention to limit appeals from all third qualifying dismissals, constitutes "strong evidence that the usual practice should be followed." *Jones*, 549 U.S. at 212. In this case, the interpretation that is consistent with the "usual practice," as well as the statutory text and purposes, is one that generally allows prisoners to take appeals of dismissals that would count as strikes—not one that effectively forecloses prisoners from doing so.

In that respect, as in others, an interpretation that requires the immediate counting of a district court's dismissal as a strike would require this Court to "leave [its] common sense at the doorstep." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989). By contrast, the majority interpretation respects finality, has proven to be workable, and avoids the complexities and anomalies of the contrary interpretation. It is also the preferable reading of the statutory text. This Court should adopt the majority interpretation and reverse the Sixth Circuit's judgments.

C. The Sixth Circuit's Interpretation Of The 'Three Strikes' Provision Is Deeply Flawed

In the decision below, the Sixth Circuit acknowledged that the vast majority of the courts of appeals have held that "dismissal does not count as a strike until the litigant has exhausted or waived his appellate rights." Pet. App. 5a. In holding that a district court's dismissal immediately counts as a strike, the Sixth Circuit attempted to ameliorate perhaps the most troubling feature of such an interpretation, as discussed above: namely, that

"[the] counting of a third dismissal still on appeal as a strike [would] lead to the anomalous conclusion that the third dismissal was itself precluded from being appealed." *Id.* at 2a.

The Sixth Circuit contended that, under its interpretation, a dismissal that counts as a third strike would not constitute a "prior occasion" in an appeal from that dismissal. Pet. App. 5a, 6a. But the Sixth Circuit's reasoning on that point actually demonstrates why a district court's dismissal cannot count as a strike until it becomes final on appeal. And when that point is put to one side, the Sixth Circuit offered virtually no affirmative reasoning to support its interpretation of the statute. The Sixth Circuit's interpretation should therefore be rejected.

1. Acknowledging that it would be "anomalous" to construe Section 1915(g) effectively to deprive a prisoner of the right to appeal from a third-strike dismissal, the Sixth Circuit devoted much of its opinion to devising a workaround for that problem. As a preliminary matter, that factual scenario is not presented by any of petitioner's underlying cases, and the Sixth Circuit said nothing about the other problems that the immediate counting of a district court's dismissal would entail. See pp. 21-25, *supra*.

In any event, the Sixth Circuit's explanation for how a prisoner could still appeal a dismissal that counts as a third strike is baffling. The Sixth Circuit reasoned that, even though such a dismissal would still count immediately as a strike against a fourth or successive suit, it would not count against an appeal from the dismissal. Pet. App. 6a. In the Sixth Circuit's view, a district court's dismissal and the ensuing appeal are "the *same* occasion" within the meaning of the statute. *Ibid.* Thus, because Section 1915(g) prohibits *in forma pauperis* status only when a prisoner's cases have been dismissed on

"3 or more prior occasions," the dismissal would not qualify as a "prior occasion[]" with regard to the appeal from the dismissal. *Ibid.*

Put simply, the Sixth Circuit's reasoning is at war with itself. That is because the Sixth Circuit's conclusion that a district's court dismissal immediately counts as a strike with regard to a fourth or successive suit cannot be reconciled with its conclusion that such a dismissal does not count with regard to an appeal from the dismissal. As discussed above, see p. 18, Section 1915(g) does not use the term "strike"; instead, it refers to qualifying "dismiss[als]" on "prior occasions." The Sixth Circuit correctly reasoned that a district court's dismissal and the ensuing appeal are "the *same* occasion." Pet. App. 6a.

It necessarily follows from that proposition that the "occasion" is not complete, and a strike should not be assessed, until the appeal has concluded—regardless of the proceeding in which *in forma pauperis* status is being sought. Under the Sixth Circuit's interpretation, a potential "occasion" is counted against a prisoner *while it is still in progress*: *i.e.*, where, as here, a fourth or successive suit is filed when an appeal from the third-strike dismissal is still ongoing. The Sixth Circuit made no effort to explain how the dismissal from an in-progress "occasion" could be counted as a strike in an unrelated suit, but not in the in-progress suit itself.

In the end, the Sixth Circuit fails to mitigate the harsh consequences of its interpretation. It is impossible to avoid the concededly "anomalous" result of an interpretation that requires the immediate counting of a district court's dismissal as a strike: *viz.*, that a prisoner is effectively precluded from appealing from a dismissal that counts as a third strike. And the Sixth Circuit's own explanation of the meaning of the phrase "prior occa-

sion[]" in Section 1915(g) amply illustrates why the majority interpretation, not the Sixth Circuit's, is the better reading of the statute.

2. The Sixth Circuit offered two affirmative arguments in passing to support its interpretation. Both of those arguments are patently flawed.

a. The Sixth Circuit contended that a "literal" reading of Section 1915(g) compelled adoption of its interpretation, on the ground that the statute "does not say that the dismissal must be final in all of the courts of the United States." Pet. App. 4a. That observation is true, but the conclusion the court drew from it does not follow. Section 1915(g) also does not expressly state that the reversal of a dismissal would prevent the dismissal from being counted as a strike. But an informed reader would surely conclude that it is implicit in the statute, in light of the PLRA's purposes, the usual practice in federal courts, and basic principles of fairness. Compare Br. in Opp. 16 (contending that "the plain language of § 1915(g) imposes no * * * finality requirement") with *id.* at 7-8 (conceding that the reversal of a dismissal would prevent the dismissal from being counted as a strike).

So too, the fact that Section 1915(g) does not expressly address the question of when a dismissal should count as a strike hardly establishes a "plain meaning" that a dismissal counts immediately. Pet. App. 5a. Instead, it simply demonstrates that the text is inconclusive and the court must resort to other tools of statutory construction. See pp. 18-21, *supra*. One need look no further than to the opinions of the seven courts of appeals that have held that a dismissal counts as a strike only after it becomes final on appeal to conclude that the statute is susceptible to more than one interpretation.

b. The Sixth Circuit also contended that its interpretation of Section 1915(g) is "consistent with how judg-

ments are treated for purposes of res judicata," under which "cases on appeal have preclusive effect until they are reversed or vacated." Pet. App. 5a. But the doctrine of res judicata, or claim preclusion, serves a distinct purpose and thus is of limited guidance here.

Claim preclusion prevents a party, after a final judgment on the merits, from "relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). Such a rule makes eminent sense given the policy considerations animating the doctrine of claim preclusion: once judgment is entered, a party no longer has the ability to raise issues in the initial lawsuit, and allowing a second lawsuit to go forward would simply give the losing party in the initial lawsuit another bite at the apple. Section 1915(g), by contrast, prevents a prisoner from pursuing *any* additional lawsuits *in forma pauperis*—however unrelated the claims in those lawsuits might be. Regardless of which interpretation of Section 1915(g) this Court adopts, the doctrine of claim preclusion would continue to bar a prisoner from seeking to litigate the same or related claims in a separate lawsuit, whether *in forma pauperis* or otherwise.

The question of how to interpret Section 1915(g) should be answered not by analogy to the distinct doctrine of claim preclusion, but rather by reference to the text and purposes of the statute, which strongly point to the conclusion that a qualifying dismissal must become final on appeal before it can count as a strike. The mere fact that the law, in some circumstances but not in others, attaches immediate consequences to district court judgments hardly constitutes compelling evidence that Section 1915(g) should be interpreted that way as well—especially in light of the complexities and anomalies that such an interpretation would present.

D. The Seventh Circuit's Interpretation Of The 'Three Strikes' Provision Is Also Deeply Flawed

The Seventh Circuit is the only other court of appeals to have adopted an interpretation that requires the immediate counting of a district court's dismissal as a strike—and it did so in a brief opinion with little reasoning. See *Robinson* v. *Powell*, 297 F.3d 540, 541 (7th Cir. 2002). Relying (like the Sixth Circuit) on a "literal[]" reading of Section 1915(g), the Seventh Circuit held that the district court in that case had erred when it granted a prisoner leave to proceed *in forma pauperis* on appeal from a dismissal that, according to the Seventh Circuit, counted as the prisoner's third strike. *Ibid.*; see Pet. App. 4a.

The Seventh Circuit, however, took an alternative approach to the Sixth Circuit's. Like the Sixth Circuit, the Seventh Circuit acknowledged that its interpretation raised a "legitimate" concern that indigent prisoners would be prevented from "obtaining appellate review of the correctness of the ruling by the district court that resulted in * * * [the] third strike." *Robinson*, 297 F.3d at 541. But the Seventh Circuit devised a different workaround for that problem. Rather than construing "prior occasion[]" to permit an appeal from a dismissal that would count as the third strike, the Seventh Circuit reasoned that a prisoner seeking to appeal from such a dismissal could file a motion under Federal Rule of Appellate Procedure 24(a)(5) asking the court of appeals for leave to proceed *in forma pauperis*. *Ibid.* In the course of deciding "whether indeed [the prisoner] had three strikes" and therefore was disqualified from *in forma pauperis* status, the Seventh Circuit explained, the court of appeals could determine whether "the district court might have erred in dismissing [the prisoner's] complaint for failure to state a claim." *Ibid.* If so, the court of ap-

peals could grant the prisoner's motion to proceed *in forma pauperis* on appeal. *Ibid.*

The Seventh Circuit's effort to mitigate the harsh effects of the purportedly "literal" interpretation is just as flawed as the Sixth Circuit's. To be sure, Rule 24(a)(5) allows a plaintiff to file a motion in the court of appeals seeking leave to proceed *in forma pauperis*, once the district court has denied the plaintiff leave to proceed *in forma pauperis* on appeal. A court of appeals' consideration of a Rule 24(a)(5) motion, however, "is not a review of the district court's denial, but an original consideration" of whether the plaintiff is entitled to proceed *in forma pauperis* on appeal. *Boling-Bey* v. *United States Parole Commission*, 559 F.3d 1149, 1154 (10th Cir. 2009); accord Fed. R. App. P 24 advisory committee's note (1967). If it is really "contrary to the language of the statute" for a district court to grant a prisoner leave to proceed *in forma pauperis* on appeal after a dismissal that would count as the prisoner's third strike, *Robinson*, 297 F.3d at 541, it is hard to see why the analysis should be any different for a court of appeals in making the identical determination itself under Rule 24(a)(5).

And the Seventh Circuit's approach would go further than merely permitting a court of appeals to review the district court's decision on whether to grant leave to proceed *in forma pauperis* status on appeal; it would permit the court of appeals, in considering a Rule 24(a)(5) motion, to review the *merits* of a district court's underlying dismissal. But the Seventh Circuit cited no support for the extraordinary proposition that a court of appeals' task in determining *in forma pauperis* status goes beyond counting up the existing strikes and includes evaluating their underlying merits. There is certainly no support for that proposition in the PLRA's "three strikes" provision. And a court cannot use a procedural rule to

circumvent the requirements imposed by a later-enacted statute. See, *e.g.*, *Jackson* v. *Stinnett*, 102 F.3d 132, 135 (5th Cir. 1996).

In addition, as the federal government has recognized in urging the adoption of the majority interpretation, the Seventh Circuit's approach "create[s] more work than is appropriate for either the courts or the litigants to resolve a request for [*in forma pauperis*] privileges." *Thompson*, 492 F.3d at 433 (quoting U.S. Br. at 24); see Pet. App. 12 (Daughtrey, J., dissenting) (noting that the Seventh Circuit's approach "threatens to make the resolution of a Rule 24(a)(5) motion more complex and involved than it is at present"). As one commentator has observed, such an approach "create[s] a technical trap for uncounselled and unsophisticated litigants while serving no actual useful purpose for the judicial system." John Boston, *The Prison Litigation Reform Act* 164 (Feb. 27, 2006) <tinyurl.com/plratreatise>

By transforming proceedings on *in forma pauperis* motions into quick-look merits appeals, the Seventh Circuit's approach is not only impermissible but also ill-advised. Because there is no principled way of mitigating its troubling consequences, this Court should reject any interpretation of Section 1915(g) that requires the immediate counting of a district court's dismissal as a strike.

E. The Sixth Circuit Erred By Counting Petitioner's Non-Final Dismissal As A Strike

The Sixth Circuit's error in holding that a district court's dismissal immediately counts as a strike for purposes of the PLRA's "three strikes" provision requires reversal of the judgments below.

1. When a prisoner seeks to proceed *in forma pauperis* in a district court, the court should determine

how many strikes the prisoner had as of the time that he submitted his complaint to the court and requested *in forma pauperis* status. Section 1915(g) precludes a prisoner with three strikes from "bring[ing] a civil action" *in forma pauperis*. Consistent with the statutory text, numerous courts of appeals have held that the relevant time at which the number of strikes should be assessed is the date on which a prisoner files his complaint—or, more precisely, the date on which the prisoner submits his complaint to the court. See, *e.g.*, *Dollar* v. *Coweta County Sheriff Office*, 510 Fed. Appx. 897, 900 (11th Cir. 2013) (per curiam); *O'Neal* v. *Price*, 531 F.3d 1146, 1152 (9th Cir. 2008); *Campbell* v. *Davenport Police Department*, 471 F.3d 952, 952 (8th Cir. 2006) (per curiam); *Nicholas* v. *American Detective Agency*, 254 Fed. Appx. 116, 117 (3d Cir. 2007) (per curiam); Pet. App. 13a (Daughtrey, J., dissenting).

2. Should this Court agree with the vast majority of courts of appeals that a district court's dismissal does not count as a strike for purposes of the "three strikes" provision until it becomes final on appeal, it should reverse the judgments below. At the time petitioner submitted his complaint and *in forma pauperis* request in each of the four underlying cases, the dismissal in *Sweeney*, which would have counted as his third strike, was still pending on appeal. J.A. 6, 13, 20, 27; Pet. App. 4a, 27a-28a, 37a-38a, 47a-48a. Under the correct interpretation of Section 1915(g), that dismissal should not have counted against petitioner, because it was not final as of the date on which petitioner submitted his complaints.

In each of the four underlying cases, however, the Sixth Circuit held that "a dismissal of a case for failure to state a claim qualifies as a 'strike' even if the appeal from the dismissal is pending at the time a prisoner files a new complaint"—and, on that basis, applied the PLRA's

"three strikes" provision to petitioner. Pet. App. 28a, 38a, 48a; see *id.* at 4a. For the reasons stated herein, that outlying holding constituted an erroneous interpretation of the "three strikes" provision. The Sixth Circuit's judgments should therefore be reversed, thereby enabling petitioner to proceed *in forma pauperis* on remand in the district court.

CONCLUSION

The judgments of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

28 U.S.C. 1915 provides:

Proceedings in forma pauperis

(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court,

in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
JUN 1 4 2015
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No. 13-1333

In the Supreme Court of the United States

ANDRE LEE COLEMAN,
AKA ANDRE LEE COLEMAN-BEY, PETITIONER
V.
TODD TOLLEFSON, ET AL.

ANDRE LEE COLEMAN, PETITIONER
V.
BERTINA BOWERMAN, ET AL.

ANDRE LEE COLEMAN, PETITIONER
V.
STEVEN DYKEHOUSE, ET AL.

ANDRE LEE COLEMAN, PETITIONER
V.
AARON J. VROMAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the "three strikes" provision of the Prison Litigation Reform Act, 28 U.S.C. § 1915(g), bars a prisoner from bringing a civil action or appealing a judgment in a civil action after three actions have been dismissed, even if the third dismissal is a district-court dismissal that is not yet final on appeal.

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STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1915(g) states:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

The full text of 28 U.S.C. § 1915 is reprinted in full in the appendix to this brief. App. 1a–5a.

INTRODUCTION

In forma pauperis status is a privilege that allows a litigant to pay filing fees late, after filing an action or an appeal, instead of paying up front. By passing the Prison Litigation Reform Act, Congress cut off that privilege for prisoners who have abused it by filing three or more meritless, frivolous, or malicious actions or appeals. When Congress set out this three-strikes rule in 28 U.S.C. § 1915(g), it used plain text that specifies the point in time when the dismissal of an action on one of these qualifying grounds qualifies as a strike: it qualifies when the "action was dismissed."

There is nothing obscure about what that phrase means. Litigants, lawyers, judges, and justices routinely use that phrase to refer to the point in time when a district court enters the order dismissing the action. Despite this common usage, Coleman argues that the dismissal should not count until it is final on appeal. But Congress did not include any final-on-appeal limitation in § 1915(g).

Quite the opposite, § 1915(g)'s plain language confirms that Congress intended to count district-court dismissals as strikes regardless of whether they are pending on appeal: the phrase "action *or* appeal" expressly distinguishes between the district-court and appellate-court components of a case, confirming that Congress intended strikes to count at each of those litigation stages—when "an action was dismissed" or when "an appeal was dismissed." And this makes sense, given that the statute addresses filing fees, which are imposed separately at the district-court and appellate stages.

Further, the statute provides only one exception to the three-strikes rule: where "the prisoner is under imminent danger of serious physical injury." § 1915(g). It includes no exception for finality on appeal, even though Congress knew how to address that precise issue, as evidenced by other statutes—including, for example, 28 U.S.C. § 2244(d)(1)(A) ("the date on which the judgment became *final by the conclusion of direct review or the expiration of the time for seeking such review*") (emphasis added), a provision enacted just *two days* before § 1915(g).

Although this is a statutory-interpretation case, Coleman does not address the ordinary meaning of the phrase "an action was dismissed" or the fact that § 1915(g) uses the disjunctive phrase "action or appeal" to separate those litigation stages. Instead, he asserts that "prior occasions" is ambiguous, so the Court should look beyond the text to determine Congress's purposes and adopt a rule that would be more lenient and administrable. But his premise is wrong: the statute unambiguously identifies the "prior occasions" that count as strikes: (1) when an "action was dismissed" and (2) when an "appeal was dismissed." Congress intended that once a prisoner has incurred three strikes, he will be treated like an ordinary citizen, who must decide if filing a complaint or an appeal is worth the cost.

Counting a strike when the district court dismisses is consistent with the ordinary rule that such dismissals have legal effect even when pending on appeal—a party wishing to delay that effect must seek a stay pending appeal, and judgments have res judicata effect even when pending on appeal.

The clear text states Congress's intent and must be enforced as written. This Court should affirm.

STATEMENT OF THE CASE

A. The history of *in forma pauperis* status

To proceed *in forma pauperis* is to proceed "[i]n the manner of an indigent who is permitted to disregard filing fees and court costs." BLACK'S LAW DICTIONARY 794 (9th ed. 2009). For the first century of our Nation's history, no right to proceed *in forma pauperis* existed. The First Congress imposed filing fees on all plaintiffs, and Congress did not enact a statute creating the possibility that a federal litigant might proceed as a pauper until 1892. *Lewis* v. *Sullivan*, 279 F.3d 526, 528 (7th Cir. 2002).

While the *in forma pauperis* statute was "designed to ensure that indigent litigants have meaningful access to the federal courts," Congress also "recognized that 'a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.'" *Denton* v. *Hernandez*, 504 U.S. 25, 31 (1992) (quoting *Neitzke* v. *Williams*, 490 U.S. 319, 324 (1989)). Accordingly, from the outset the statute allowed courts "to dismiss an *in forma pauperis* complaint 'if satisfied that the action is frivolous or malicious.'" *Id.*; see also *Brinkley* v. *Louisville & N.R. Co.*, 95 F 345 (C.C.W.D. Tenn. 1899).

In 1991, this Court amended its own rules to address a problem that the rules were "not effective" in handling: the problem of "abusive" *in forma*

pauperis filings. *In re Amendment to Rule 39*, 500 U.S. 13, 14 (1991). The Court explained that "to preserve meaningful access to this Court's resources, and to ensure the integrity of our processes, we find it necessary and advisable to promulgate this amendment to Rule 39, to provide us some control over frivolous or malicious *in forma pauperis* filings." *Id.* at 13–14. The amendment made clear that this Court may deny pauper status for frivolous filings and thus "may enter orders similar to those entered by the lower federal courts for almost 100 years pursuant to 28 U.S.C. §§ 1915(a) and (d), and their predecessors." *Id.* at 14.

Five years after this Court adopted its rule designed to deny pauper status to those who abused it, Congress took up the same issue by introducing the Prison Litigation Reform Act. Senator Kyl, one of the PLRA's sponsors, recognized that "prisoners have very little incentive not to file nonmeritorious lawsuits." 141 Cong. Rec. S7526 (May 25, 1995). "Unlike other prospective litigants who seek poor person status, prisoners have all the necessities of life supplied, including the materials required to bring their lawsuits," and thus "no incentive to limit suits to cases that have some chance of success." *Id.*

Senator Kyl recounted frivolous suits actually filed by inmates around the country. One inmate "claimed $1 million in damages for civil rights violation because his ice cream had melted." 141 Cong. Rec. S14629 (Sept. 29, 1995). Another "alleged that being forced to listen to his unit manager's country and western music constituted cruel and unusual punishment." *Id.* Yet another "sued because

he was served chunky instead of smooth peanut butter." *Id.* And still another brought a retaliation claim based on the allegation that "he was not invited to a pizza party thrown for a departing DOC employee." *Id.*

Congress's discussion of frivolous prisoner filings also specifically noted the impact such filings have on appellate courts: "the fifth circuit [has] expressed frustration with the glut of 'frivolous or malicious appeals by disgruntled state prisoners.' " 141 Cong. Rec. S7526 (1995) (quoting *Gabel* v. *Lynaugh*, 835 F.2d 124, 125 (5th Cir. 1988) (per curiam)). " 'About one appeal in every six which came to [the Fifth Circuit's] docket (17.3%) the last four months was a state prisoner's pro se civil rights case.' " *Id.* (quoting *Gabel*, 835 F.2d at 125 n.1). " 'A high percentage of these [appeals] are meritless, and many are transparently frivolous,' " with the appeals having a reversal rate of only 5.08%. *Id.* The Fifth Circuit's frustration was shared by other circuits. For example, the Fourth Circuit observed in 1995 that "during the last three years, the percentage of *in forma pauperis* filings on appeal has increased from about one-third to *one-half of all filings*," and "[p]risoner litigation constitute[d] roughly 75% of the *in forma pauperis* cases filed in the Fourth Circuit." *Nasim* v. *Warden, Md. House of Corr.*, 64 F.3d 951, 954 & n.1 (4th Cir. 1995) (en banc).

Based on these and similar concerns, Congress passed the Prison Litigation Reform Act, Pub. L. No. 104–134, 110 Stat. 1321 (Apr. 26, 1996). The PLRA amended 28 U.S.C. § 1915 in several ways. For one, it required prisoners who qualify for pauper status—

and therefore are excused from paying filing fees before filing—"to pay the full amount of a filing fee" as funds become available to them. Specifically, § 1915(b) provides that the "court shall assess and, when funds exist, collect, as partial payment of any court fees required by law, an initial partial filing fee" of 20% of the prisoner's average monthly income (or, if greater, of the prisoner's average monthly account balance). This provision reflects the fact that prisoners, unlike other individuals who qualify for *in forma pauperis* status, have all of the necessities of life—such as food, clothing, shelter, and medical care—provided to them by the state. Thus, it allows the prisoner to retain 80% of his income or balance for paying off debts (such as victims' rights payments or fees for destroying state property) and for discretionary spending.

The PLRA also added the subsection at issue in this case, commonly known as the three-strikes rule:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury. [§ 1915(g).]

Section 1915(g) thus "does not block a prisoner's access to the federal courts." *Abdul-Akbar* v.

McKelvie, 239 F.3d 307, 314 (3d Cir. 2001) (en banc). "It only denies the prisoner the privilege of filing before he has acquired the necessary filing fee." *Id.*

B. Coleman incurs three dismissals

Incarcerated in 1983 for armed robbery and a related firearm felony, André Lee Coleman incurred his first district-court dismissal in 1992 in *Coleman* v. *Lentin*. J.A. 33, 45. His civil action alleged that prison officials violated his due-process rights by finding him guilty of misconduct without first contacting defense witnesses or the guards accusing him to resolve factual disputes. J.A. 33. The district court concluded that the disciplinary procedures, which included "several levels of appeals," satisfied due process. J.A. 38. The district court dismissed the action "as frivolous and without merit." J.A. 39, 45. Coleman did not appeal the district court's dismissal.

Coleman incurred his second dismissal in 2008 in *Coleman* v. *Kinnunen*. J.A. 46. In that action, he alleged that he was denied access to the courts when a state-court clerk returned a petition on the ground that Coleman had filed it in the wrong county. J.A. 46. The district court concluded Coleman had not suffered any actual injury, because he could have filed a new action showing that the county was the proper venue or sought an order from the Michigan Court of Appeals directing the clerk to file the petition. J.A. 48. The district court granted the motion to dismiss the action and concluded that it could "discern no good-faith basis for an appeal," and accordingly denied Coleman's motion for pauper status on appeal. J.A. 49; see § 1915(a)(3) ("An appeal may not be taken in forma pauperis if the

trial court certifies in writing that it is not taken in good faith."). Coleman nonetheless appealed, and the Sixth Circuit affirmed for the same reasons the district court had given. J.A. 51–52.

Coleman incurred his third dismissal in 2009 in *Coleman* v. *Sweeney*. J.A. 53. This time he asserted nine claims, most of which alleged denial of access to the courts and retaliation for filing grievances. J.A. 56. The district court dismissed the action "for failure to state a claim." J.A. 53. As to Coleman's claims about access to the courts, the court concluded (as had the court in *Kinnunen*) that Coleman had failed to allege any actual injury. J.A. 60. As to his retaliation claims, the court concluded that the challenged conduct—"conducting 'an unnecessary, unwarranted informal administrative hearing' "—was not an adverse action but rather an opportunity to seek redress for his grievances. J.A. 60. Rejecting Coleman's remaining claims, the district court dismissed the action and stated that it could discern "no good-faith basis for an appeal." J.A. 65. Coleman appealed anyway, and the Sixth Circuit affirmed for reasons consistent with the district court's reasoning. J.A. 162–63.

C. Coleman brings four more actions after his third action was dismissed but while it is pending on appeal

While the dismissal in *Sweeney* was pending on appeal, Coleman filed four additional civil actions within the space of roughly ten months: *Coleman* v. *Vroman*, *Coleman* v. *Bowerman*, *Coleman* v. *Tollefson*, and *Coleman* v. *Dykehouse*. J.A. 66, 93, 119, & 139. These actions include some claims

similar to those in his prior dismissals—retaliation claims, J.A. 90, 115, access-to-courts claims, J.A. 89, 134, and due-process claims, J.A. 116—but he also asserted claims based on new theories. For example, in *Dykehouse* he alleged violations of "a Constitutional Right to receive warranty replacement appliances" and of "a Constitutional Right to broadcast speakers in the form of real-time entertainment and real-time free flowing information under the First Amendment of the U.S. Constitution." J.A. 156–57.

D. The district-court decisions

The district court in *Tollefson* concluded the prior dismissals in *Lentin*, *Kinnunen*, and *Sweeney* were prior occasions that counted as dismissals under § 1915(g). Pet. App. 19a. It therefore ordered Coleman to pay the $350 filing fee within 28 days, or else it would dismiss the action without prejudice. On reconsideration, the district court rejected Coleman's argument that the dismissal did not count because an appeal remained pending. Pet. App. 23a. The court reasoned that the clear language of § 1915(g) "does not make an exception for a dismissal that has been appealed" and that "a judgment of dismissal by a district court is final and should be given full effect, unless stayed upon appeal." Pet. App. 23a. The district court further recognized that a contrary reading would allow a plaintiff to "avoid the effect of § 1915(g) by filing three frivolous lawsuits simultaneously and appealing each dismissal," while remaining free to "continue to file frivolous lawsuits while the appeals were pending." Pet. App. 24a. The district court, though, granted Coleman leave to file his appeal *in forma pauperis*. Pet. App. 2a.

The district-court decisions in *Dykehouse*, *Vroman*, and *Bowerman* followed similar reasoning. In each, the district court listed the three actions that had previously been dismissed and the dates when the district court had entered those dismissals and counted each dismissal as a prior occasion qualifying as a strike. Pet. App. 44a, 53a, & 34a.

E. The Sixth Circuit's decision

In *Tollefson*, the Sixth Circuit affirmed the denial of pauper status in a divided opinion. Pet. App. 1a. Focusing on the statute's text, the majority concluded that "§ 1915(g) requires district courts to count as strikes cases that are dismissed on the ground enumerated even when pending on appeal." Pet. App. 4a. The majority recognized that "§ 1915(g) 'does not say that the dismissal must be final in all of the courts of the United States' " to count as a strike. Pet. App. 4a. Further, counting a district-court dismissal as a strike is "consistent with how judgments are treated for purposes of res judicata," because "cases on appeal have preclusive effect until they are reversed or vacated." Pet. App. 5a.

The majority concluded, however, that a "third strike may be appealed even though it would count as a strike with regard to a fourth or successive suit." Pet. App. 6a. In its view, "[a] third strike that is on appeal is not a *prior* occasion for the purposes of that appeal, because it is the *same* occasion." Pet. App. 6a.

In dissent, Judge Daughtrey contended that § 1915(g) "is ambiguous, not only with respect to when dismissals should count as strikes but also with respect to what counts as a 'prior occasion.' "

Pet. App. 9a. Expressing concern that counting a district-court dismissal as a third strike would "effectively eliminate [the court's] appellate function," she therefore would count a dismissal only if it were final on appeal. Pet. App. 8a, 11a (quoting *Thompson* v. *Drug Enforcement Admin.*, 492 F.3d 428, 432 (D.C. Cir. 2007)).

Relying on its decision in *Tollefson*, the Sixth Circuit subsequently affirmed the decisions denying pauper status in *Bowerman*, *Dykehouse*, and *Vroman*. Pet. App. 28a, 38a, & 48a.

SUMMARY OF ARGUMENT

1. Section 1915(g)'s plain text readily answers the timing question presented by this case. In ordinary usage, the point in time when "an action was dismissed" is the date on which the district court entered its judgment of dismissal. Here, as Coleman acknowledges, district courts dismissed his prior actions on qualifying grounds (i.e., as frivolous or for failure to state a claim) in 1992, 2008, and 2009. Pet. Br. 6–7. Therefore, because his actions brought in 2010 and 2011 did not allege any imminent danger of serious physical injury, the statute required that he pay the district-court or appellate-court filings fees before he could bring another action or appeal: "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action under this section if the prisoner has, on 3 or more occasions brought an action that was dismissed on [qualifying] grounds." § 1915(g).

The statute thus is neither silent nor ambiguous on when a strike counts: it counts when "an action

was dismissed." As this Court's decisions and the federal rules each confirm, this phrase has a common meaning that is clear and well understood. Coleman had three prior dismissals when he filed his actions in 2010 and 2011, so under the statute's unambiguous language, he can no longer file as a pauper.

The fact that § 1915(g) expressly differentiates between "action or appeal" separately confirms that Congress intended for strikes to count at each stage of a suit, not only when the appeal was complete. As the federal rules illustrate, the word "action" refers to the district-court stage of a case, while the word "appeal" refers to a different stage. This distinction makes perfect sense in context, given that filing fees are assessed separately at each of those stages.

Further, the phrase "prior occasions" is not, as Coleman contends, ambiguous. To the contrary, the entire point of the statute is to spell out which occasions can give rise to a strike. The statute identifies two occasions: (1) when an "action was dismissed" and (2) when an "appeal was dismissed." By enumerating these two separate occasions, Congress made clear that they are not, as Coleman contends, just a single occasion. In short, Congress recognized that prisoners should be deterred not just from filing meritless actions, but also from taking meritless appeals. That is why the courts of appeals have unanimously agreed that prisoners can be awarded two strikes *in the same case*, if they follow a meritless action with a frivolous appeal. But under Coleman's approach a prisoner would never be deterred from taking a frivolous appeal from a third district-court dismissal.

Even setting aside the ordinary meaning of "was dismissed, "action or appeal," and "prior occasions," two other principles of statutory interpretation bar reading Coleman's proposed exception into the statute.

First, the fact that Congress enumerated one exception in the statute (allowing pauper status even after three actions have been dismissed when there is an imminent risk of serious physical injury) shows that courts may not read in Coleman's proposed unenumerated exception (allowing pauper status even after three actions have been dismissed if the third action is still pending on appeal).

Second, just *two days* before Congress passed § 1915(g)'s three-strikes provision, it passed two other statutes that expressly provided that district-court judgments would not have a particular legal effect until they were final on appeal. For example, in 28 U.S.C. § 2244(d)(1)(A), Congress expressly provided that district-court judgments would not trigger a limitations period until "the date on which the judgment became *final by the conclusion of direct review or the expiration of the time for seeking such review*." (Emphasis added). The fact that the same Congress that included this final-on-appeal requirement in § 2244(d)(1) chose not to include similar language in § 1915(g) is strong evidence that Congress did not intend to include any final-on-appeal requirement in the three-strikes rule.

Following the statute's plain text by counting a strike at the time of a district-court dismissal is consistent with the ordinary rule that district-court dismissals of civil actions have immediate legal

effect. The fact that stays pending appeal are not automatic, that district-court judgments have res judicata effect even when pending on appeal, and that interest begins accumulating from the date of the district-court judgment all illustrate this.

And § 1915(g)'s text is plain—so much so that circuits imposing a final-on-appeal requirement have been forced to acknowledge that they were not following the "literal" words of the statute when they read in this exception. But a judicial desire to make the statute more lenient cannot justify departing from Congress's clear directive. Dismissed means dismissed.

2. The statutory text reveals Congress's purpose: to preclude both actions and appeals after a third action has been dismissed. While Coleman complains that this negative consequence is a harsh one, it is the consequence Congress intended. Thus, to the extent counting a strike immediately raises an obstacle to appellate review (as some courts of appeals have charged, worrying that it might ossify district-court errors) or makes it more difficult to file further possibly meritorious actions, Congress intended those outcomes for those who have repeatedly abused pauper status. Further, those outcomes are caused by *all* filing fees: the mere existence of filings fees means that even non-indigent litigants will sometimes not pursue meritorious claims or not appeal district-court dismissals that might have been erroneous. And regardless of whether a third district-court dismissal counts immediately as a strike or not until it is final on appeal, the three-strikes rule necessarily will

preclude prisoners from "bring[ing] a civil action or appeal[ing] a judgment" from that point forward (unless they pay the required fees at the time of filing). It is filing fees themselves and the existence of a three-strikes rule that cause those effects, regardless of how this case is resolved.

In any event, this is not an unduly harsh outcome. It merely returns specific prisoners who have repeatedly abused the pauper status to the status quo that law-abiding citizens face every day: they must decide if the action or appeal is worth the cost. It is an outcome that this Court itself has repeatedly imposed on prisoners who have abused the opportunity to file *in forma pauperis* at the Supreme Court stage, even though this Court's denial of pauper status also risks ossifying lower court errors—and to a greater degree, since those circuit-court errors might be precedential.

3. Counting strikes from the day a district court dismisses an action is an easily administrable rule. It simply requires checking the docket to determine when the action was dismissed. And if a dismissal of a third strike is later reversed, then the ordinary rules of judgments will also be easy to apply. Just as a district-court judgment ceases to have res judicata effect once it is reversed—because a reversal renders the judgment void, as if it had never occurred—so too will a third strike be erased, as if it never occurred. Nothing in the statute suggests Congress intended to change this well settled rule.

ARGUMENT

I. Actions dismissed by a district court count immediately as strikes under § 1915(g).

Section 1915(g)'s plain text applies in a straightforward manner to this case. When Coleman filed four civil actions in 2010 and 2011, he had, on "3 or more prior occasions" "brought an action or appeal in a court of the United States that was dismissed on the grounds that it was frivolous or fails to state a claim upon which relief may be granted." § 1915(g). Specifically, he had brought three actions, and each was dismissed—*Lentin* in 1992, *Kinnunen* in 2008, and *Sweeney* in 2009—either as frivolous or for failing to state a claim. J.A. 39, 49, 53. Coleman alleges no facts implicating the one exception enumerated in the statute—he does not claim to be "under imminent danger of serious physical injury." Pet. App. 19a–20a. Accordingly, § 1915(g)'s plain text dictates that "[i]n no event" shall he be allowed "to bring a civil action or appeal a judgment in a civil action or proceeding under this section"—that is, as a pauper who is excused from paying the filing fees before filing.

Despite this plain text, some courts have read into § 1915(g) a requirement that district-court dismissals must be final on appeal to count as a strike. But what this Court said in *Jones* v. *Bock* when addressing the PLRA is just as true here—"such a result must be obtained by the process of amending the [statute], and not by judicial interpretation.' " 549 U.S. 199, 217 (2007).

A. Under § 1915(g)'s plain text, an action is dismissed when a district court acts, regardless of whether an appeal follows.

The plain language of the statute is, as this Court has frequently observed, the best evidence of Congress's intent. E.g., *Nixon* v. *United States*, 506 U.S. 224, 232 (1993) (citing "the well-established rule that the plain language of the enacted text is the best indicator of intent."). This is why this Court has recognized that it "must enforce plain and unambiguous statutory language according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010).

Section 1915(g)'s plain language shows that Congress specifically intended (1) to count a district-court dismissal when the district court enters it, (2) to count dismissals of a district-court action separately from dismissals of an appeal, and (3) to treat district-court dismissals and appellate-court dismissals as separate occasions under the statute.

1. In ordinary usage, an action is considered "dismissed" when the district court dismisses it, not when any appeal has been resolved.

Contrary to Coleman's assertions, e.g., Pet. Br. 11–12, 16, the statutory text *does* expressly address when a strike counts: it counts when "an action or appeal was dismissed" for a qualifying reason. In ordinary English, an action is dismissed when the district court issues an opinion and order saying so, regardless of whether an appeal might ensue. As Judge O'Scannlain observed, "[a] strike is not contingent in any way on the case's subsequent

appellate process, which is nowhere mentioned in section 1915." *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1107 (9th Cir. 2011) (O'Scannlain, J., dissenting).

For example, an English speaker of ordinary competence would have no difficulty understanding the following statement from Coleman's brief about when Coleman's third dismissal occurred: "The district court dismissed for failure to state a claim in October 2009, but petitioner appealed." Pet. Br. 7. That sentence, consistent with common usage, properly treats the dismissal as having occurred at the time the district court reached its decision in October 2009. J.A. 65. This usage does not jump out as internally inconsistent or as a distortion of what the word "dismissed" means, even if the reader knows that the *Sweeney* dismissal did not become final on appeal until March 2011. J.A. 160. But if Coleman were right that an action should not be considered "dismissed" until "it has become final on appeal," Coleman Br. 12, then the sentence should cause a reader to pause.

Nor would an ordinary English speaker have any difficulty understanding the following sentence from one of this Court's leading cases about dismissals, even though the sentence says nothing about whether the dismissal was final on appeal: "The United States District Court dismissed the complaint for failure to state a claim upon which relief can be granted." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 552 (2007). An everyday reader would understand that the term "dismissed" was talking about an event that occurred in the district court at a

particular point in time, regardless of a subsequent appeal (or lack thereof).

In short, common usage of the phrase "an action that was dismissed" refers to the district court's act of dismissing a case. It does not refer to the appellate court's act of resolving an appeal arising from a district court's dismissal.

One need look no further than recent Supreme Court Reporters to confirm this understanding. E.g., *Millbrook* v. *United States*, 133 S. Ct. 1441, 1442 (2013) ("The District Court dismissed Millbrook's action, and the Court of Appeals affirmed."); *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1333 (2013) ("The District Court dismissed the action for failure to state a claim. The Court of Appeals for the Ninth Circuit reversed."); *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1314 (2012) ("The state trial court dismissed the action for postconviction relief The Arizona Court of Appeals affirmed Martinez's conviction."); *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1065 (2014) ("[T]he court dismissed the class actions under the Litigation Act. The Fifth Circuit reversed."). As these cases show, in ordinary usage an "action" was "dismissed" regardless of what subsequently happened on appeal. And the point in time when those dismissals occurred may be easily ascertained by determining the date of the relevant district-court order.

If one wants to look further than the Reporters, the relevant federal rules also confirm that the dismissal of "an action" refers to an event that occurs in the district court. While the rules that govern *district courts* refer repeatedly to *an action* being

dismissed, the rules that govern the *courts of appeals* use the word "dismissed" *only* to refer to the dismissal of *an appeal*. Compare, e.g., FED. R. CIV. P. 19(b) ("the *action* should proceed among the existing parties or should be *dismissed*"), 19(b)(4) ("whether the plaintiff would have an adequate remedy if the *action* were *dismissed* for nonjoinder"), 23.1(c) ("A derivative *action* may be voluntarily *dismissed*"), 25(a) ("the *action* by or against the decedent must be *dismissed*"), and 41(a)(2) ("an *action* may be *dismissed* at the plaintiff's request only by court order"), with FED. R. APP. P. 3(a)(2) ("*dismissing* the *appeal*"), 3(c)(4) ("An *appeal* must not be *dismissed* for informality of form"), 12.1(b) ("*dismisses* the *appeal*"), 27(c) (a circuit judge acting alone "may not *dismiss* or otherwise determine an *appeal*"), 31(c) ("an *appellee* may move to dismiss the *appeal*"), 39(a)(1) ("if an *appeal* is *dismissed*, costs are taxed against the appellant, unless the parties agree otherwise"), 42(a) ("*dismiss* the *appeal*"), 42(b) ("An *appeal* may be *dismissed* on the appellant's motion on terms agreed to by the parties or fixed by the court.") (emphasis added to each quote). This too shows that the ordinary meaning of the clause "an action was dismissed" is that it refers to the district court's dismissal, regardless of any appeal.

2. Section 1915(g) counts a dismissal whether it is the dismissal of "an action" or of an "appeal."

This common understanding—that the dismissal of "an action" is the act of a district court—is independently verified by the fact that § 1915(g)'s text expressly distinguishes between actions and appeals and counts a dismissal of each as a separate

strike. § 1915(g) ("an action *or* appeal that was dismissed") (emphasis added). This contrast between an "action" and an "appeal" confirms that "an action" refers not to the entire life of the lawsuit but to the district-court component of the suit. See also § 1915(a)(1), (a)(2), (b)(1), (b)(3), (b)(4), (e)(2) (each distinguishing between "action" and "appeal"). And this distinction makes sense, given the context of the statute: the *in forma pauperis* statute focuses on the events that cause fees—"bring[ing] a civil action or appeal[ing] a judgment in a civil action," e.g. § 1915)(a)(2), (g)—and all agree that filing fees are imposed separately for filings at the district-court level and at the appellate-court level. Accord Pet. Br. 5–6.

Again, the federal rules are helpful: they confirm that "an action" usually refers to the district-court component of a suit. The Federal Rules of Civil Procedure begin by stating they "govern the procedure in all civil *actions* and proceedings *in the United States district courts*." FED. R. CIV. P. 1 (emphasis added). Consistent with this usage, the Federal Rules of Appellate Procedure use a different term—"appeal"—to refer to the appellate component of the suit. Even more tellingly, the appellate rules repeatedly use "district-court action" when referring to the district-court component of a case. FED. R. APP. P. 5 ("The petition must be filed with proof of service on all other parties to the *district-court action*."), 12(a) ("circuit clerk must docket the appeal under the title of the *district-court action*"), 30(e) ("[i]f a transcript of a proceeding before an administrative agency was used in a *district-court action*") (emphasis added in each quote).

In fact, the Federal Rules of Appellate Procedure draw this distinction in the specific context at issue in this case—in addressing *in forma pauperis* status. Rule 24(a)(1) provides that "[e]xcept as stated in Rule 24(a)(3), a party to a *district-court action* who desires to appeal in forma pauperis must file a motion in the district court." (Emphasis added). And Rule 24(a)(3) specifies that "[a] party who was permitted to proceed in forma pauperis in the *district-court action*, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization," unless the district court certifies that the appeal would not be taken in good faith or unless a statute precludes granting pauper status. (Emphasis added).

These examples confirm that when Congress used the phrase "action or appeal was dismissed" in § 1915(g), it intended for courts to count district-court dismissals as strikes, separate from what happens on appeal. And even though his argument depends on the proposition that "a district court's dismissal and the ensuing appeal from that dismissal constitute a single 'occasion' for purposes of the statute," Pet. Br. 12, Coleman makes no attempt to reconcile this proposition with the fact that the statute separates "action" from "appeal" and counts the dismissal of each as strikes. Nor does he ever address the everyday meaning of "action was dismissed" or the distinction between an "action" and an "appeal." Instead, he asserts that § 1915(g) is silent as to when a dismissal should count as a strike, and that " 'such silence normally creates ambiguity[;] [i]t does not resolve it.' " Pet. Br. 17

(quoting *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002)). But even setting aside the fact that the statute is *not* silent—the phrase "action was dismissed" *does* specify a point in time—silence would not help Coleman here, because the meaning of statutory silence depends on context, and applying two common rules of statutory interpretation here would remove any possible ambiguity.

First, when a statute enumerates specific exceptions, silence as to additional exceptions means that no more exceptions exist. *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1953 (2013) (" '[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.' ") (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980)). Here, the statute is emphatic that only one exception exists: "*In no event* shall a prisoner bring a civil action or appeal a judgment if the prisoner has, on 3 or more occasions brought an action or appeal that was dismissed" for qualifying reasons "*unless the prisoner is under imminent danger of serious physical injury*." § 1915(g) (emphasis added). The statute does not include the additional caveat, as Coleman would have it, that a prisoner is barred "unless an action that was dismissed is still pending on appeal."

Second, two other statutes, 28 U.S.C. § 2244(d)(1)(a) and § 2255(f)(1), each relating to habeas procedure, show that Congress knew how to include the exception that Coleman wants to insert here: that a district-court decision would not have a

particular legal effect until it was final on appeal. In 28 U.S.C. § 2244(d)(1)(A), Congress specified that a judgment would not trigger a specific legal effect (starting the clock for the statute of limitations applicable to state prisoners seeking postconviction relief) until it was final on appeal: "The limitation period shall run from the latest of the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review " Similarly, in 28 U.S.C. § 2255(f)(1) Congress provided that a limitation period for petitions by federal prisoners could be triggered by "the date on which the judgment of conviction becomes final." This Court has interpreted the phrase "becomes final" in § 2255(f)(1) to mean final on appeal. *Clay* v. *United States*, 537 U.S. 522, 527–528 (2003) (explaining that Congress's use of this phrase in the context of postconviction relief, given this Court's "unvarying understanding of finality for collateral review purposes," means that a judgment is not final under § 2255(f)(1) until direct review by this Court ends or the time for such review expires). In other words, in each of these statutes, Congress used specific language to indicate that a judgment would not have legal effect until final on appeal.

Here, in contrast, when Congress was considering when a dismissal would trigger a particular legal effect (counting as a strike), it did not include any language relating to finality. See *Silva*, 658 F.3d at 1107 (O'Scannlain, J., dissenting) ("The fact that the statute does *not* state that a dismissal must become 'final' to count against the prisoner counsels that we look no further than the fact of *dismissal* when tallying strikes."). And unlike

in the context of a postconviction collateral attack addressed in *Clay*, the ordinary rule for district-court dismissals is, as explained more fully in Part I.B below, that district-court dismissals have immediate effect.

The inclusion of this finality requirement in § 2244(d) and § 2255(f)—but not in § 1915(g)—is particularly significant because of *when* Congress included this language in § 2244 and § 2255. As this Court has explained, " '[n]egative implications raised by disparate provisions are strongest' in those instances in which the relevant statutory provisions were 'considered simultaneously when the language raising the implication was inserted.' " *Gomez-Perez* v. *Potter*, 553 U.S. 474, 486 (2008) (quoting *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997)). Here, the negative implication is at its strongest, as these two habeas statutes that do include a final-on-appeal requirement were passed *two days* before the PLRA was amended to add § 1915(g). See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1214 (Apr. 24, 1996); Prison Litigation Reform Act of 1995, Pub. L. 104–134, 110 Stat 1321 (Apr. 26, 1996); see also *Carson* v. *Johnson*, 112 F.3d 818, 820 (5th Cir. 1997) (observing that AEDPA "became effective two days before the PLRA did").

Given that Congress expressly decided on April 24, 1996, to include language in two statutes (§ 2244 and § 2255) that would limit the legal effect of a district court's judgment until it was final on appeal, the decision of the same Congress to omit any reference to finality in this statute (§ 1915(g)) just

two days later, on April 26, 1996, is quite telling: It shows that Congress knew exactly how to limit the effect of a district court's judgment when it was pending on appeal, but chose *not* to impose that limitation in § 1915(g). See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Courts, therefore, are not free to undo Congress's decision by reading that limitation into the statute.

3. "Prior occasions" refers to the occasions expressly identified in the statute: dismissal by a district court or dismissal by an appellate court.

The context just discussed confirms that § 1915 is unambiguous about what the phrase "prior occasions" means. *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) ("A statutory 'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.' "). Section 1915(g) enumerates two—and only two—types of prior occasions that can count as strikes: first, where a prisoner has "brought an action that was dismissed" for a qualifying reason, and second, where a prisoner has "brought an appeal that was dismissed" for a qualifying reason. This enumeration of the two events that can give rise to a strike expressly distinguishes between dismissal of "an action"

(again, a district-court event) and dismissal of "an . appeal" (an appellate event).

As Judge Calabresi has explained, "[g]iven that § 1915(g)'s phrase 'action or appeal' disjunctively juxtaposes 'action' and 'appeal,' it seems most natural to read them as connoting two separate parts of one larger lawsuit." *Chavis* v. *Chappius*, 618 F.3d 162, 168 (2d Cir. 2010). Quoting a Seventh Circuit decision, he further explained that this understanding is consistent with Congress's intent to deter frivolous appeals too, not just frivolous complaints:

> "Under this language, bringing an action and filing an appeal are separate acts. One could be frivolous, the other not. Having been told that his complaint is frivolous, a prisoner must decide whether to appeal. Prisoners who learn from their mistakes will suffer one strike, at most, in a case. Obstinate or malicious litigants who refuse to take no for an answer incur two strikes. That approach not only comports with the statutory language but also fortifies the deterrence of frivolous activities in litigation." [*Id.* (quoting *Newlin* v. *Helman*, 123 F.3d 429, 433 (7th Cir. 1997) (Easterbrook, J.), overruled on other grounds by *Walker* v. *O'Brien*, 216 F.3d 626 (7th Cir. 2000), and *Lee* v. *Clinton*, 209 F.3d 1025 (7th Cir. 2000).]

Consistent with this plain text, "[e]*very circuit court to address the matter* has held that sequential dismissals"—i.e., a district-court dismissal and an appellate dismissal *in the same case*—"count as two

strikes." *Chavis*, 618 F.3d at 167 (emphasis added); accord *Jennings* v. *Natrona County Det. Ctr. Med. Facility*, 175 F.3d 775, 780 (10th Cir. 1999) ("If we dismiss as frivolous the appeal of an action the district court dismissed , both dismissals count as strikes."); *Hains* v. *Washington*, 131 F.3d 1248, 1250 (7th Cir. 1997) (per curiam) ("A frivolous complaint (or as in this case a complaint that is dismissed for failure to state a claim) followed by a frivolous appeal leads to two 'strikes' under 28 U.S.C. § 1915(g)."); *Henderson* v. *Norris*, 129 F.3d 481, 485 (8th Cir. 1997) (per curiam) ("[W]e conclude that Henderson's appeal is frivolous, and notify him that the dispositions of both his complaint and his appeal are 'strikes' under § 1915(g)."") (footnote omitted); *Adepegba* v. *Hammons*, 103 F.3d 383, 388 (5th Cir. 1996) ("Congress suggests in the statute that *any* appeal dismissed as frivolous counts against the petitioner; it makes no exception for frivolous appeals of district court dismissals. Therefore we find that Congress would have us count both the dismissal in the district court *and* the separate dismissal of the appeal as frivolous.").

This is significant: all of these circuits recognize that Congress intended the dismissal of an action and the dismissal of an appeal to count as *separate* occasions under § 1915(g) and to result in two strikes in the same case. Indeed, reading it otherwise would allow a prisoner who filed a frivolous appeal after each district-court dismissal to get "three frivolous actions and three frivolous appeals." *Rodriguez* v. *Cook*, 169 F.3d 1176, 1178 (9th Cir. 1999). It therefore would be inconsistent with Congress's intent to conclude, as Coleman wishes, that "a

district court's dismissal and the ensuing appeal from that dismissal constitute a single 'occasion' for purposes of the statute." Pet. Br. 12.

Although Coleman cites *Chavis*, *Jennings*, and *Adepegba* repeatedly, he never mentions the two-strikes-in-one case rule. Nor does he grapple with its implications: the rule confirms that the language "action or appeal" conveys Congress's intent to count district-court dismissals and appellate dismissals as separate occasions under the statute.

Instead, Coleman observes that "a court of appeals' *affirmance* of [a district-court] dismissal does not count as a distinct strike; only a qualifying *dismissal* of the appeal would do so." Pet. Br. 18. This is true, but all it proves is that statutory language matters. Congress did not use the word "affirmance" or "affirmed" in § 1915(g); it instead referred to "an appeal that was dismissed," and dismissing an appeal is different from affirming a judgment. E.g, FED. R. APP. P. 39(a) (addressing the assessment of costs "if an appeal is *dismissed*" in one subsection, but addressing the assessment "if a judgment is *affirmed*" in a separate subsection) (emphasis added); *Riley* v. *Plump*, 128 S. Ct. 1930 (2008) ("[P]ending this Court's action on the appeal," "[i]f the appeal is dismissed, or judgment affirmed, this order shall terminate automatically.").

Dismissing an appeal is when, for example, a court terminates a frivolous appeal in midstream, rather than wasting its limited resources by going through the full appellate process simply to affirm in the end. Indeed, in another provision of § 1915 Congress acted to protect judicial resources by

directing that courts *must* dismiss an action once they determine it is frivolous: "Notwithstanding any filing fee , the court *shall* dismiss the case at any time if the court determines that the action or appeal is frivolous or malicious " § 1915(e)(2)(B)(i) (emphasis added). And not only do courts have that statutory obligation, they also have inherent authority to dismiss an appeal once it becomes apparent it is frivolous. *Mallard* v. *United States Dist. Ct.*, 490 U.S. 296, 307–08 (1989) ("Section 1915(d)"—now § 1915(e)—"for example, authorizes courts to dismiss a 'frivolous or malicious' action, but there is little doubt they would have power to do so even in the absence of this statutory provision."); see also *Pillay* v. *INS*, 45 F.3d 14, 17 (2d Cir. 1995) ("[T]his court has inherent authority, wholly aside from any statutory warrant, to dismiss an appeal or petition for review as frivolous when the appeal or petition presents no arguably meritorious issue for our consideration.").

This distinction between what an affirmance is and a dismissal is explains why, for example, when the Tenth Circuit in *Jennings* summarized the rules flowing from its interpretation of § 1915(g), it set out one rule for if it "affirm[ed] a district court dismissal" and another for if it "dismiss[ed] as frivolous the appeal of an action the district court dismissed"; in the former circumstance, the district-court dismissal counts as "a single strike," while for the latter "both dismissals count as strikes." 175 F.3d at 780; accord *Thompson*, 492 F.3d at 440 ("Appellate dismissals count as strikes" but "[a]ppellate affirmances do not," "unless the court expressly states that the appeal

itself was frivolous, malicious or failed to state a claim.").

In short, the relevant statutory words—"action," "appeal," "prior occasions," and "was dismissed"—all confirm that Congress intended district-court dismissals to count as strikes when the district court enters the dismissal. The interpretation of the "three strikes" provision, therefore, that most faithfully hews to § 1915's text—which is the best indicator of Congress's purpose—is the one that counts a district-court dismissal as a strike when it occurs.

B. Treating district-court dismissals as strikes is consistent with the ordinary rules about district-court judgments.

This understanding of the phrase "an action was dismissed" is also consistent with the usual rule that district-court judgments, including dismissals, have legal effect even before they are final on appeal. And, as Coleman acknowledges, courts should follow the usual procedural rules unless Congress expressly departs from them, Pet. Br. 26–27 (citing *Jones*, 549 U.S. at 216), which it did not do here.

Stays pending appeal demonstrate the usual rule that district-court judgments have legal effect when entered. If a party that loses in a district court wants to escape the fact that a judgment against it can be enforced even during the period for appeal, the party must seek a stay. E.g., FED. R. CIV. P 62(d) (requiring a party to post a bond to stay a judgment); FED. R. APP. P 8(a) (requiring the permission of a court to stay the effect of a judgment); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE

§ 2905 (3d ed.) ("In the absence of a stay obtained in accordance with Rule 62(d), the pendency of an appeal does not prevent the judgment creditor from acting to enforce the judgment."). In other words, the party seeking a stay must justify why a court should deviate from the normal course of treating the judgment as immediately enforceable and should instead grant a stay pending appeal.

Rules governing res judicata also recognize that district-court judgments have effect even if the period for appeal is still open. As this Court has explained, "[t]ypically, a federal judgment becomes final for appellate review and claim preclusion purposes when the district court disassociates itself from the case, leaving nothing to be done at the court of first instance save execution of the judgment." *Clay* v. *United States*, 537 U.S. 522, 527 (2003); accord *Erebia* v. *Chrysler Plastics Prods. Corp.*, 891 F.2d 1212, 1215 n. 1 (6th Cir. 1989) ("[T]he established rule in the federal courts is that a final judgment retains all of its preclusive effect pending appeal."); *Nat'l Post Office Mail Handlers* v. *Am. Postal Workers Union*, 907 F.2d 190, 192 (D.C. Cir. 1990) (explaining that the "federal rule is to grant preclusive effect to [a] final judgment even when appeal is pending"); *Ross ex rel. Ross* v. *Bd. of Educ. of Twp. High Sch. Dist. 211*, 486 F.3d 279, 284 (7th Cir. 2007) ("the fact that an appeal was lodged does not defeat the finality of the judgment"); 18A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4433 (2d ed. 2002) ("The bare act of taking an appeal is no more effective to defeat preclusion than a failure to appeal."); 18 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 131.30[2][c] (3d

ed.) ("A final judgment in federal court can be the basis for claim preclusion despite the fact that an appeal is pending, or that the judgment may be subject to appeal in the future.").

Even comparatively minor details—like when interest begins to run—confirm that district-court judgments have legal consequences. FED. R. APP. P. 37(a) ("Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered."); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE PROCEDURE § 2785 (3d ed.) ("Ordinarily interest on a judgment runs from the date of its entry "). And nothing in § 1915(g) suggests that Congress intended to depart from the usual practice in the federal courts that district-court dismissals have legal effects, even if pending on appeal and therefore subject to reversal.

Quite the opposite, another provision of § 1915 shows that Congress affirmatively wanted district-court judges to be able to deny a prisoner pauper status for purposes of appealing a ruling *in the same case*: "*An appeal may not be taken* in forma pauperis if the *trial court* certifies in writing that it is not taken in good faith." § 1915(a)(3) (emphasis added). Both the statutory language and the usual practice point in the same direction: Congress intended a district court's dismissal of an action to count when entered by the district court, regardless of any appeal.

This reasoning tracks this Court's decision in *Jones*. There, the Sixth Circuit imposed procedural

requirements on prisoners that were not found in the text of the PLRA itself. Specifically, the court of appeals required the prisoner to plead facts with specificity to show exhaustion. 549 U.S. at 202. The Sixth Circuit imposed this heightened-pleading requirement for what it thought were good policy reasons: " 'to facilitate the Act's screening requirements' " so that the PLRA would "function effectively." *Id.* at 213, 214 (quoting *Baxter* v. *Rose*, 305 F.3d 486, 488 (6th Cir. 2002)). In response, this Court admonished "that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Id.* at 212. While this Court understood "the reasons behind the decisions of some lower courts to impose a pleading requirement on plaintiffs in this context," "that effort cannot fairly be viewed as an interpretation of the PLRA." *Id.* at 216. Because "the lower court's procedural rule lack[ed] a textual basis in the PLRA," this Court refused to read the procedural requirement into the statute. *Id.* 217.

This same analysis applies here. As Coleman concedes with commendable candor, it is "true" that "the statute 'does not say that the dismissal must be final in all of the courts of the United States.' " Pet. Br. 30 (quoting Pet. App. 4a). In other words, the text of the PLRA does not require that a district-court dismissal be final on appeal to count as a strike. Even if lower courts think there are good reasons for departing from the statute's text—in other words, even if they would write the statute differently were it up to them—this Court should not follow them by penciling into the PLRA a finality requirement that Congress did not impose.

C. Courts that have imposed a finality requirement have acknowledged that they are not following § 1915(g)'s text.

Despite § 1915(g)'s plain text, a number of circuits have relied on "the policy concern that a 'hyper-literal' reading of § 1915(g)"—i.e., applying the plain text—"will 'freeze out meritorious claims or ossify district court errors' by effectively preventing appellate courts from performing their function." *Henslee* v. *Keller*, 681 F.3d 538, 543 (4th Cir. 2012). But like *Henslee*, every circuit that has relied on this policy concern has affirmatively admitted that it is departing from the statute's plain text.

Take the Fifth Circuit's 1995 decision in *Adepegba*, the case that started the trend of reading a finality requirement into § 1915(g). There, the Fifth Circuit openly admitted that the statutory text would count a district-court dismissal as a strike even if it were still subject to appeal: "A hyper-literal reading of the statute might also bar a prisoner's appeal of an erroneous third strike, since the appeal would follow three prior dismissals." 103 F.3d at 388. The court nonetheless decided that a dismissal "should not count against a petitioner until he has exhausted or waived his appeals." *Id.* at 387. The Fifth Circuit thus substituted its view of when a dismissal should count for Congress's. But see *Jones*, 549 U.S. at 216 ("the judge's job is to construe the statute—not to make it better").

Other circuits adopting the rule that Coleman urges have, like the Fourth and Fifth Circuits, overtly admitted that the text Congress actually wrote requires a prisoner to pay filing fees up front

after a third district-court dismissal. *Jennings*, 175 F.3d at 780 (10th Cir.) ("[A] 'hyper-literal' reading of § 1915(g) to count all district court dismissals as 'prior occasions' whether or not the litigant has appealed those decisions could bar a prisoner's appeal of an erroneous third strike, since the appeal would follow three prior dismissals. Or, an indigent prisoner's fourth claim could expire while one or more of his first three dismissals was being reversed on appeal."); *Ball* v. *Famiglio*, 726 F.3d 448, 465 (3d Cir. 2013) (same); *Chavis*, 618 F.3d at 169 (2d Cir.) (admitting that "the seemingly natural reading of § 1915(g)" means that "a district court dismissal that counts as a third strike would effectively be unreviewable," but reading a finality-on-appeal requirement into the statute to avoid this outcome); *Silva*, 658 F.3d at 1099 n.5 (9th Cir.) (criticizing the Seventh Circuit because it "applied § 1915(g) 'literally' and reasoned that once a case is dismissed, it must immediately be counted as a strike"); *Thompson*, 492 F.3d at 432 (D.C. Cir.) (recognizing that "section 1915(g) nowhere expressly states that dismissals must be final to count as strikes," but concluding that limitation is "fairly implied"). Even the dissent below makes this admission. Pet. App. 9a (criticizing the Seventh Circuit for its "literal reading of the provision"). In short, these decisions concede that they are failing to apply the statute as Congress wrote it.

II. Applying § 1915(g)'s plain text furthers Congress's purpose of ending abusive filings.

Courts taking the tack of inserting a final-on-appeal requirement into the statute have justified

the insertion by asserting that applying the text "would, within those narrow set of cases in which the third strike is appealed, effectively eliminate our appellate function." *Thompson*, 492 F.3d at 432; see also, e.g., *Chavis*, 618 F.3d at 169; *Silva*, 658 F.3d at 1099 n.5. They have argued that "[h]ad Congress intended such an unusual result, we expect it would have clearly said so." *Thompson*, 492 F.3d at 432.

The first problem with this argument is that Congress *did* clearly say it was eliminating *in forma pauperis* appeals. The opening words of the three-strikes statute show that Congress specifically intended to deny pauper status for appellate filings after a third district-court dismissal: "*In no event* shall a prisoner *appeal a judgment* under this section if the prisoner has, on 3 or more prior occasions brought *an action* that was dismissed" on qualifying grounds. § 1915(g) (emphasis added). Under this plain language, once a prisoner has incurred three dismissals (whether district-court or appellate), he may no longer initiate a new appeal as a pauper. And another provision of § 1915 also confirms that Congress was willing to terminate pauper status *on appeal*: "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." § 1915(a)(3).

The argument's second problem is that requiring a prisoner to pay a filing fee before appealing a civil judgment does not eliminate her ability to appeal—it simply returns her to the place of the ordinary American citizen who must pay the filing fee before filing. "Adherence to this procedure no more

'effectively eliminate[s] our appellate function' than does the requirement of filing fees in general." *Silva*, 658 F.3d at 1108 (O'Scannlain, J., dissenting).

Along the same lines, the argument started in *Adepegba* and carried forward through its progeny—the argument that § 1915(g) must be read to include a final-on-appeal requirement so as "not to freeze out meritorious claims or ossify district court errors," 103 F.3d at 388; see also *Jennings*, 175 F.3d at 780; *Thompson*, 492 F.3d at 433; *Silva*, 658 F.3d at 1100; *Henslee*, 681 F.3d at 541; *Ball*, 726 F.3d at 465—is really a criticism that applies to filing fees in general, not just to filing fees that apply because of § 1915(g). *All* filing fees create a risk of barring meritorious claims or leaving district-court errors intact, in cases filed by the indigent and the non-indigent alike, yet that is not a reason to second-guess Congress's decision to impose filing fees.

Treating a prisoner—someone who has all of life's necessities provided for him (food, shelter, clothing, and medical care) by his fellow citizens—like an ordinary law-abiding citizen who must decide if filing an action or an appeal is worth the cost is not, as Coleman would have it, a "harsh" result. E.g., Pet. Br. 13. To the contrary, it is precisely what Congress intended. As Senator Kyl explained, requiring prisoners to pay filing fees before filing "will force prisoners to think twice about the case and not just file reflexively." 141 Cong. Rec. S7526 (May 25, 1995). "Prisoners will have to make the same decision that lawabiding Americans must make: Is the lawsuit worth the price?" *Id.*

As the Fourth Circuit recognized when rejecting a challenge to other provisions of the PLRA, the statute's approach is "hardly draconian": "Requiring prisoners to make economic decisions about filing lawsuits does not deny access to the courts; it merely places the indigent prisoner in a position similar to that faced by those whose basic costs of living are not paid by the state." *Roller* v. *Gunn*, 107 F.3d 227, 233 (4th Cir. 1997). "Those living outside of prisons cannot file a lawsuit every time they suffer a real or imagined slight[;] [i]nstead, they must weigh the importance of redress before resorting to the legal system." *Id.* In fact, "[i]f a prisoner determines that his funds are better spent on other items rather than filing a civil rights suit, 'he has demonstrated an implied evaluation of that suit' that the courts should be entitled to honor." *Id.* (quoting *Lumbert* v. *Illinois Dep't of Corrs.*, 827 F.2d 257, 259 (7th Cir. 1987)); *Rodriguez* v. *Cook*, 169 F.3d 1176, 1180 (9th Cir. 1999) ("If inmates are unwilling to save their money and prepay filing fees, such a decision may be a good indicator of the merits of the case. Courts would be well served by prisoners making such a decision before filing claims.").

In short, "[p]risoners are not similarly situated to non-prisoners": unlike non-prisoners, "[t]hey have their basic material needs provided at state expense," "[t]hey are further provided with free paper, postage, and legal assistance," and "[t]hey often have free time on their hands that other litigants do not possess." *Roller*, 107 F.3d at 234.

Nor does requiring a prisoner to pay a full filing fee up front after a third strike necessarily preclude

the prisoner from filing an appeal. A prisoner with three strikes has a "list of options." *Lewis*, 279 F.3d at 530. He could "[p]ay the filing fee" "using assets on hand." *Id.* He could "[s]ave up in advance to be able to pay the fee in a lump sum." *Id.* He could "[b]orrow the filing fee from friends and relatives." *Id.* He could "[b]orrow the filing fee from a lawyer—for 42 U.S.C. § 1988 promises reimbursement of prevailing prisoners' legal expenses, and this plus a share of any recovery may well attract the assistance of counsel, who may (and often do) advance their clients' expenses in contingent-fee cases." *Id.* This option would be available to a prisoner with a truly meritorious claim. Or he could "[s]ue in state rather than federal court," *id.*, assuming he has not already run afoul of a state three-strikes provision, e.g., MICH. COMP. LAWS § 600.5507(1).

To put the first two options in perspective, it is important to remember that prisoners are not without the opportunity to earn money. They can earn income by working within the prison in a variety of unskilled or skilled positions, by attending educational or training programs, by working outside the prison on public works, or by working within a correctional industrial facility. In Michigan, for example, inmates can earn wages at a rate of roughly $850 a year by taking educational classes or by working in the prisoner food service. See, e.g., Mich. Dep't of Corr. Policy Directive 05.02.110 at attachment A (listing daily and hourly pay schedule). Michigan prisoners can earn higher wages by qualifying to work for Michigan State Industries, a program that teaches prisoners marketable skills and provides work experience; working for MSI, a

prisoner can earn wages at a rate of up to almost $1,850 a year. See Mich. Dep't of Corr. 2013 Statistical Report at F-12 (listing hourly pay schedule). Given that filing a complaint costs $400 and filing an appeal costs $505, accord Pet. Br. 6, a diligent Michigan prisoner could earn sufficient funds to pay the appellate filing fee in about three months. Accord *Lewis*, 279 F.3d at 530 ("Sav[ing] up in advance to be able to pay the fee in a lump sum would have taken Lewis about two months, had he deemed the litigation sufficiently important to justify using all of his income for this purpose").

Any claim that this is a harsh result is further undermined by the fact that not being able to appeal a third strike is a risk that falls only on prisoners who have already demonstrated on three occasions a propensity to abuse the judicial system. There is nothing harsh about subjecting such a prisoner to consequences for that continued abuse. *Lewis*, 279 F.3d at 531 ("Section 1915(g) imposes a penalty for crying 'wolf.' "). As the Seventh Circuit has observed, "[s]ection 1915(g) singles out only a subset of prisoners—those who have established, by their own conduct, that they are among the abusers of the judicial system," and [r]equiring persons who have abused the *forma pauperis* privilege in the past to pay in the future is a sensible and modest step." *Id.* at 529. And as the Eighth Circuit put it, prisoners "risk the known possibility of being denied IFP status for future nonfrivolous § 1983 action when they choose to continue filing frivolous, malicious, and meritless suits after receiving notice of dismissals that would count as § 1915(g) strikes; indigent inmates therefore control whether the

three-strikes rule is ever applied to them." *Higgins* v. *Carpenter*, 258 F.3d 797, 800 (8th Cir. 2001).

Indeed, this Court itself has cut off appeals for prisoners who have demonstrated that they are abusing the *in forma pauper* privilege, even though that too risks ossifying lower court errors—which, if published, are binding precedent in their circuit—and freezing out meritorious appeals. E.g., *In re McDonald*, 489 U.S. 180, 184 (1989) (barring prisoner from filing extraordinary writs *in forma pauperis*); *In re Sindram*, 498 U.S. 177, 180 (1991) (per curiam) (same); *Shieh* v. *Kakita*, 517 U.S. 343 (1996) (barring prisoner from filing petitions for certiorari *in forma pauperis*); *Martin* v. *D.C. Court of Appeals*, 506 U.S. 1 (1992) (same). In *Sindram*, this Court recognized that it "has a duty to deny *in forma pauperis* status to those individuals who have abused the system" to prevent frivolous filings "from unsettling the fair administration of justice." 498 U.S. at 597. And it has observed that " '[e]very paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources," and that "[a] part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice." *Martin*, 506 U.S. at 3 (quoting *In re McDonald*, 489 U.S. at 184).

In the end, the "negative consequences" that Coleman complains about "are precisely the consequences intended by Congress." *Abdul-Akbar*, 239 F.3d at 315. When an inmate who has already incurred two qualifying dismissals files a meritless action, Congress intended that "[i]n no event" should

the prisoner be allowed either to "bring a civil action"—let alone the four Coleman brought—or to "appeal" that dismissal while using the privilege of pauper status. § 1915(g). Congress intended to take away a statutory privilege that it created—the privilege of paying later, instead of up front—from those who have abused it. See *White* v. *Colorado*, 157 F.3d 1226, 1233 (10th Cir. 1998) (" 'proceeding [*in forma pauperis*] in a civil case is a privilege, not a right—fundamental or otherwise' ") (quoting *Rivera* v. *Allin*, 144 F.3d 719, 724 (11th Cir. 1998, and adding alteration), abrogated on other grounds by *Jones*, 549 U.S. at 204 n.2); accord *Abdul-Akbar*, 239 F.3d at 314 ("the privilege of filing I.F.P."); *Adepegba*, 103 F.3d at 385 ("the PLRA revokes prisoners' privileges to proceed i.f.p."); *Lewis*, 279 F.3d at 528 ("there is no constitutional entitlement to subsidy").

Two more points warrant brief comment, each relating to Coleman's call for leniency. First, Coleman observes that "the Sixth Circuit offered virtually no affirmative reasoning to support its interpretation of the statute" that "a dismissal that counts as a third strike would not constitute a 'prior occasion' in an appeal from that dismissal." Pet. Br. 28. That criticism is valid, but Coleman draws the wrong conclusion from it. Pet. Br. 29 (arguing that "the 'occasion' is not complete, and a strike should not be assessed, until the appeal has concluded"). As already explained, § 1915(g) specifies the "prior occasions" that it is talking about: the dismissal of an action and the dismissal of an appeal. Thus, the Sixth Circuit's erroneous premise that an action and an appeal can be the same occasion—the premise on

which Coleman's case rests—cannot be reconciled with the fact "that § 1915(g)'s phrase 'action or appeal' disjunctively juxtaposes 'action' and 'appeal.'" *Chavis*, 618 F.3d at 168.

Second, Coleman also notes that the Seventh Circuit attempted, in *Robinson* v. *Powell*, 297 F.3d 540, 541 (7th Cir. 2002), "to mitigate the harsh effects of the purportedly 'literal' interpretation" of § 1915(g) by allowing a prisoner to ask the court of appeals for leave to file *in forma pauperis* under Federal Rule of Appellate Procedure 24(a)(5). Pet. Br. 33. But asking for leave under Rule 24(a) should not be an option, because, as Coleman correctly acknowledges, "a court cannot use a procedural rule to circumvent the requirements imposed by a later-enacted statute." Pet. Br. 33–34. That is why, after the Seventh Circuit's decision in *Powell*, Rule 24 was amended "to clarify that the rule is not meant to conflict with anything required by the PLRA or any other statute." Advisory Committee's Notes on 2002 Amendment to FED. R. APP. P. 24. The 2002 amendments, which took effect about five months after the Seventh Circuit decided *Powell*, added subsection (a)(3)(B) to Rule 24. That subsection provides that although someone granted pauper status in the district court ordinarily will automatically qualify for pauper status on appeal, this automatic qualification does not apply if "a statute provides otherwise." Some ambiguity remains in the rule as a textual matter because this new subsection appears only under the automatic IFP provision—subsection (a)(3)—and not under the discretionary IFP provision—subdivision (a)(5). But to the extent that subsection (a)(5) formerly gave

appellate courts discretion to grant pauper status regardless of the number of prior dismissals a prisoner had incurred, Congress eliminated that discretion by passing the PLRA. See, e.g., *Jackson* v. *Stinnett*, 102 F.3d 132, 135 (5th Cir. 1996) ("Rule 24 does not nullify section 1915 of the PLRA Quite the opposite, the PLRA repeals the inconsistent provisions of Rule 24(a).").

In the end, courts must apply § 1915(g) as written. They can no more circumvent it by means of a procedural rule than they can rewrite it by inserting a finality-on-appeal requirement.

III. Counting a district-court dismissal is an easily administrable rule.

Coleman spends much effort arguing that his proposed rule would be easier for courts to administer. Pet. Br. 12, 13, 21–25. To justify this effort, Coleman relies on the proposition that "this Court should attach particular weight to considerations of workability and administrability" when "interpreting a statute that governs the processing of lawsuits by federal courts." Pet. Br. 21 (citing *Hertz Corp.* v. *Friend*, 559 U.S. 77, 80 (2010)). But while those considerations properly apply when interpreting "ambiguous language," *Hertz*, 559 U.S. at 83–84, they do not justify disregarding unambiguous text. "However attractive" "an 'easily administrable standard' " might be, it cannot be imposed if "it is not a rule rooted in the [statutory] text." *Golan* v. *Holder*, 132 S. Ct. 873, 891 n.32 (2012). In statutory construction, "one cardinal rule must govern, and it is this; that wherever the will or intention of the lawmaking power is declared in

plain and unequivocal terms, that will or intention must be followed—absolutely followed." *Binns* v. *Lawrence*, 53 U.S. 9, 17 (1851).

In short, the question before the Court is not how Congress *should* have drafted the statute. The question is what rule *did* Congress draft. See *Jones*, 549 U.S. at 216 ("The judge 'must not read in by way of creation,' but instead abide by the 'duty of restraint, th[e] humility of function as merely the translator of another's command.' ") (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533–34 (1947)).

In any event, there is nothing difficult about applying a rule that a third strike counts at the time the district court dismissed the action. As this case illustrates, all a court needs to do to apply § 1915(g)'s text is determine when the district court dismissed the action. The courts in this case had no difficulty with this approach. E.g., Pet. App. 4a (relying on the date of the district court dismissal), 19a, 34a, 44a, 53a. Indeed, this step merely requires looking at the district court's docket, and so is simpler than doing the math required to determine whether the time for an appeal has run (or whether extensions are available, such as to petition for certiorari). See *Ball*, 726 F.3d at 465 n. 22 (observing that a finality-on-appeal rule "leaves open the question of whether a prisoner accrues a strike as soon as a dismissal by the district court is affirmed by a court of appeals, or only when the Supreme Court has denied or dismissed a petition for a writ of certiorari or the time for filing one has passed").

Coleman's primary argument that Congress's rule is difficult to apply focuses on the possibility that a prisoner who already has two prior strikes against him for meritless filings might suffer an erroneous dismissal of a third action that was actually meritorious. As an initial matter, this is, probability-wise, likely to be a very small subset of cases. But more fundamentally, it is simply a consequence of the ordinary principle that district-court judgments have legal effect from the time they are entered, unless they are subsequently reversed (or stayed).

Again, settled principles of res judicata show that this "fluid approach," to use Coleman's phrase, Pet. Br. 22, is a routine aspect of the law of judgments. As one circuit recently observed, "[d]ating back at least to *Butler* v. *Eaton*, 141 U.S. 240, 242–44 (1891), a bedrock principle of preclusion law has been that a reversed judgment cannot support preclusion; indeed, 'a second judgment based upon the preclusive effects of the first judgment should not stand if the first judgment is reversed.' " *Levi Strauss & Co.* v. *Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1372 (Fed. Cir. 2013) (quoting 18A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4433 (2d ed. 2002) (footnote and parallel citations omitted)); *id.* (" 'Should the judgment be reversed on appeal, however, res judicata [in the sense covering both preclusion doctrines] falls with the judgment.' ") (quoting 18A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4427 at 5, and adding alteration); accord *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 15–16 (2001) (Ginsburg, J., concurring in the judgment) ("a 'judgment based

upon the preclusive effects of [a prior] judgment should not stand if the [prior] judgment is reversed' ") (alterations in original); *State of California Dep't of Soc. Servs.* v. *Thompson*, 321 F.3d 835, 847 (9th Cir. 2003) ("Once a decision of the district court is reversed, the 'judgment cannot serve as the basis for a disposition on the grounds of res judicata or collateral estoppel.' "); *Salton, Inc.* v. *Philips Domestic Appliances & Pers. Care B.V.*, 391 F.3d 871, 881 (7th Cir. 2004) ("[O]nce a judgment is reversed it ceases to have collateral estoppel effect.").

This rule makes sense, because a reversal "vacates the judgment entirely, technically leaving nothing to which [a court] may accord preclusive effect." *Dodrill* v. *Ludt*, 764 F.2d 442, 444 (6th Cir. 1985); accord *Butler*, 141 U.S. at 244 (describing a judgment that had been reversed as "without any validity, force, or effect, and ought never to have existed"); 36 C.J.S. *Federal Courts* § 739 ("the effect of a general and unqualified reversal of a judgment, order, or decree is to nullify it completely and to leave the cause standing as if such judgment, order, or decree had never been rendered"); 5 AM. JUR. 2D *Appellate Review* § 803. This reasoning shows that once a district-court dismissal has been reversed, it is completely nullified, as if it had never occurred, so no strike could be based on a reversed dismissal.

Applying these same principles to § 1915(g) is no more difficult to administer than this "bedrock principle of preclusion law" is. *Levi Strauss & Co.*, 719 F.3d at 1372. It is simple to apply the rule that a strike counts until it is reversed. If a third strike is reversed, then the prisoner can resume using pauper

status for any new claims that might have arisen since the erroneous dismissal. And during that time period when the appeal is pending, the prisoner may proceed like any other citizen, by paying the filing fee up front out of his income (which is available for discretionary spending, given that the state is providing his necessities) or by borrowing the money. And while Coleman expresses concern that a statute of limitations might run on a meritorious claim during the pendency of appeal, Pet. Br. 22–23, a prisoner with a meritorious claim could borrow from a lawyer or even buckle down to earn the money before the limitations period ends. Again, "[i]f inmates are unwilling to save their money and prepay filing fees, such a decision may be a good indicator of the merits of the case." *Rodriguez*, 169 F.3d at 1180.

Thus, even setting aside the fact that courts must enforce statutes as written, the statute that Congress wrote is in fact readily administrable.

* * *

In the end, there is nothing in § 1915(g) that suggests Congress intended to impose a final-on-appeal requirement or to deviate from the usual procedure that a district-court judgment would have legal effect when entered. To the contrary, all signs indicate that Congress intended just the opposite. Accordingly this Court should affirm the court of appeals and hold that an action is dismissed under § 1915(g) when the district court enters its judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Dated: JANUARY 2015

APPENDIX

28 U.S.C. § 1915 provides:

(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment

of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the

record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

REPLY BRIEF

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A/K/A ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

TODD TOLLEFSON, ET AL.

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v.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This is the rare case in which respondents before this Court argue that a statute unambiguously compels their interpretation, yet simultaneously reject the interpretation of the lower court whose decision they are purportedly defending. Under respondents' interpretation of the "three strikes" provision of the Prison Litigation Reform Act (PLRA), 28 U.S.C. 1915(g), a district court's dismissal of a lawsuit immediately counts as a strike, even on appeal from that very dismissal. Respondents

wisely make no effort to defend the Sixth Circuit's concededly "erroneous" reasoning, under which a dismissal immediately counts as a strike against a different suit despite the Sixth Circuit's recognition that a district court's dismissal and the ensuing appeal constitute part of a single "occasion." And by advocating an interpretation that effectively bars even an appeal from a third-strike dismissal, respondents go further than the Seventh Circuit, the only other circuit to have held that a dismissal counts as a strike while it is pending on appeal (albeit with an interpretation that also differs from the Sixth Circuit's).

Further complicating matters, the United States, having previously advocated *petitioner's* interpretation, now advances an idiosyncratic interpretation of its own. While also rejecting the Sixth Circuit's interpretation (and the Seventh Circuit's approach to appeals from third-strike dismissals), the United States offers an interpretation under which a dismissal immediately counts as a strike against a fourth or successive suit, but not against an appeal from a third-strike dismissal.

If your head is spinning, you are not alone. At a minimum, the existence of four different approaches just on respondents' side of the case—two of which have never been adopted by *any* court of appeals—is nigh on conclusive proof that, when it comes to the question of when a dismissal counts as a strike, Section 1915(g) is ambiguous. Under those circumstances, there is no reason to depart from the approach taken by the vast majority of the courts of appeals, under which a dismissal counts as a strike only once it becomes final on appeal. That interpretation is the best reading of Section 1915(g), and certainly a textually permissible one. It serves the purposes of the statute; avoids the unjust and anomalous results of the various alternatives; and is the most administrable of

all the options. The contrary interpretations are solutions in search of a problem, because, as petitioner's amici have shown, there is no evidence that the majority interpretation has created any difficulties for the numerous courts applying it in the nearly two decades since the PLRA's enactment. This Court should adopt the majority interpretation and reverse the judgments below.

A. The Text And Underlying Purposes Of The PLRA Indicate That A Dismissal Counts As A Strike Only Once It Becomes Final On Appeal

Section 1915(g) generally bars a prisoner from proceeding *in forma pauperis* in federal court if "the prisoner has, on 3 or more prior occasions, while incarcerated * * *, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." While the text of Section 1915(g) addresses the question of *what* can qualify as a strike (*i.e.*, a dismissal on certain grounds of an action or appeal), it does not specifically address the discrete question of *when* a dismissal counts as a strike. The best reading of Section 1915(g) is that a dismissal does not count as a strike until it becomes final on appeal. Insofar as respondents and the United States argue that the text of the statute does not permit that interpretation, their arguments are unavailing.

1. If it were not obvious before, it should now be beyond dispute that Section 1915(g) does not have "a plain and unambiguous meaning with regard to the particular dispute in the case": *i.e.*, when a dismissal counts as a strike. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). In the decision below, the Sixth Circuit offered one interpretation of the relevant language. See Pet. App. 4a-7a. Respondents advocate another interpretation, criticizing the Sixth Circuit's reasoning as "errone-

ous." See Br. 18-32, 44. The United States disagrees with the Sixth Circuit and respondents and advances yet another interpretation. See Br. 25-27. And none of those interpretations is consonant with the Seventh Circuit's approach. See *Robinson* v. *Powell*, 297 F.3d 540, 541 (2002). About the only thing on which all of those courts and parties can agree is that the statutory text unambiguously supports their respective interpretations. See *id.*; Pet. App. 5a; Resp. Br. 18; U.S. Br. 12, 18.

Petitioner addresses the particular failings of respondents' and the United States' interpretations below. For now, however, the existence of those four competing interpretations—along with the fifth interpretation adopted by most courts of appeals—amply demonstrates that Section 1915(g) is ambiguous on the question of whether a dismissal counts as a strike immediately or only once it has become final on appeal.

In an effort to rule out the majority interpretation, respondents contend that the courts to have adopted that construction have "acknowledged that they are not following [the statutory] text." Br. 36-37. That contention, however, rests primarily on one court's disparaging characterization of a contrary interpretation as "hyperliteral." *Adepegba* v. *Hammons*, 103 F.3d 383, 388 (5th Cir. 1996). Far from engaging in a purposivist frolic from a bygone era, the courts to have favored the majority interpretation have largely *rejected* the argument that immediately counting a dismissal as a strike is the literal or most natural reading of the statutory text. See, *e.g.*, *Chavis* v. *Chappius*, 618 F.3d 162, 169 (2d Cir. 2010). Instead, those courts have concluded that the text is ambiguous because it "does not expressly state whether a prior dismissal of 'an action or appeal' must be final before it can be considered a 'strike,'" and have construed the statute to avoid the problems inherent in a contrary

interpretation. *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1098-1100 (9th Cir. 2011); see Pet. App. 9a (Daughtrey, J., dissenting).

2. The best reading of the text of Section 1915(g) is that a dismissal does not count as a strike until it becomes final on appeal. That is because, while a "dismiss[al]" on certain grounds can qualify as a strike, it counts only when the "occasion[]" on which the "dismissal" occurred is complete: *i.e.*, when the appeal from the dismissal has run its course. Respondents' and the United States' criticisms of that interpretation are unconvincing.

Respondents and the United States argue that petitioner's interpretation of "prior occasion[]" in Section 1915(g) ignores the statute's distinction between an "action" and an "appeal." See Resp. Br. 21-24, 27-32; U.S. Br. 17-19. Not so. Petitioner has consistently acknowledged that qualifying dismissals by a district court and a court of appeals constitute distinct strikes and give rise to distinct "occasions"; the relevant question is when each of those "occasions" is complete. See Pet. Br. 18-19 & n.7. If anything, the fact that a qualifying dismissal by a court of appeals initiates a distinct "occasion," but a mere affirmance does not, suggests that the "occasion" initiated by a district court's dismissal continues until the appellate process is complete. Consistent with that proposition, many courts to have acknowledged that dismissals in a district court and a court of appeals qualify as separate strikes have also held that those dismissals do not *count* as strikes until they are final on appeal. See, *e.g.*, *Chavis*, 618 F.3d at 169; *Jennings* v. *Natrona County Detention Center Medical Facility*, 175 F.3d 775, 780 (10th Cir. 1999); *Adepegba*, 103 F.3d at 388.

Respondents' only other argument based on the actual text of Section 1915(g) is also readily dispatched.

Respondents contend (Br. 24) that the exception in the "three strikes" provision for cases in which the prisoner is in imminent physical danger indicates that no other exceptions exist. That is true but irrelevant. This case concerns the logically antecedent question of when a dismissal counts as a strike for purposes of triggering the "three strikes" rule in the first place—not whether a prisoner who is *already* subject to the "three strikes" rule qualifies for an exception.

3. As a textual matter, petitioner's interpretation of Section 1915(g), under which a dismissal does not count as a strike until it becomes final on appeal, is superior to the novel interpretations offered by respondents and the United States.

a. Having lauded the Sixth Circuit in their opposition to rehearing for its "thoughtfully reasoned opinion," Resp. C.A. Opp. to Pet. for Reh'g 6, respondents now disavow the Sixth Circuit's reasoning as "erroneous." Br. 44. Specifically, respondents reject the Sixth Circuit's interpretation that a district court's dismissal and the ensuing appeal constitute part of a single "occasion." Respondents instead take an even more aggressive position than either the Sixth or Seventh Circuit (or, for that matter, any other court of which we are aware), advocating an interpretation under which a dismissal immediately counts as a strike even on appeal from that very dismissal. See Br. 18-32.

Respondents apparently rest their interpretation on the view that the "occasion[]" corresponding to a "dismissal" begins and ends with the act of dismissal, without taking into account any subsequent proceedings on appeal. In support of that view, respondents devote many pages to the undisputed proposition that a dismissal by a district court and a subsequent dismissal by a court of appeals qualify as distinct strikes and give rise

to distinct "occasions." See Br. 18-24. It does not follow, however, that an "occasion[]" is *complete* when the dismissal is entered, rather than when the appeal from the dismissal has run its course. As noted above, the fact that the text of Section 1915(g) addresses the question of *what* can qualify as a strike does not answer the discrete question of *when* a dismissal counts as a strike. As to that latter question, respondents simply have nothing to say about the statutory text.

b. For its part, the United States also rejects the Sixth Circuit's interpretation, but reaches the same result as the Sixth Circuit through its own interpretation of the phrase "prior occasion[]"—an interpretation, like respondents', that (to the best of our knowledge) no court at any level has accepted. See Br. 12-19, 25-27.

To begin with, the United States barely acknowledges the fact that, as recently as the last Administration, it argued to the D.C. Circuit that *petitioner's* interpretation of Section 1915(g) was the correct one. See Br. of Appellees at 24, *Thompson* v. *DEA*, 492 F.3d 428 (D.C. Cir. 2007) (Nos. 04-5450 & 05-5082) (filed Oct. 30, 2006). The sole explanation the Solicitor General provides for the government's about-face is that, in the prior case, "[t]he brief's discussion of the issue was perfunctory." Br. 14 n.2. The government's discussion in that brief of when a dismissal counts as a strike, however, was not some passing aside: that question was one of the issues presented to, and decided by, the D.C. Circuit. Indeed, the D.C. Circuit expressly noted the government's position, even quoting from its brief, in adopting the majority view that a dismissal does not count as a strike until it has become final on appeal. See *Thompson*, 492 F.3d at 432-433.

Astoundingly, the United States now asks this Court to hold that Section 1915(g) *unambiguously forecloses*

the interpretation that it previously advocated. See Br. 12, 18. While the government has been known to change position from time to time, we are unaware of any case in which the Solicitor General has argued that the "plain text" of a statute forecloses its previous interpretation (and instead compels an interpretation that no court, to the best of our knowledge, has adopted).

The change in position aside, the interpretation the United States now offers is unmoored from the statutory text. In an effort to preserve a prisoner's ability to appeal from a third-strike dismissal, the United States contends that the statutory phrase "prior occasion[]" refers to a prior dismissal *in a different suit.* See Br. 25-27.[1] But if the "occasion[]" corresponding to a "dismissal" begins and ends with the act of dismissal, it would necessarily follow that a "prior occasion[]" is an "occasion" (*i.e.*, an act of dismissal) that occurs before the strikes are being counted. See 12 *Oxford English Dictionary* 508 (2d ed. 1989) (defining "prior" as "[p]receding (in time or order); earlier, former, anterior, antecedent"). To avoid that implication—which would effectively prohibit an appeal from a third-strike dismissal—the government simply reads into the statute a limitation to dismissals in different suits. See Br. 25.

The only explanation the United States offers for its linguistic gymnastics is that, under any other interpretation, the word "prior" would be superfluous because, in determining whether a prisoner has three strikes, a

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[1] Although the United States defines "prior occasions" at one point as "strikes imposed in prior-filed suits" (Br. 25), that appears to be an imprecise formulation: presumably, the United States would consider a dismissal in a case that was filed *later* than the instant suit to qualify as a strike, as long as the dismissal itself has occurred by the time the strikes are being counted.

court will always be looking back to "prior" strikes. See Br. 26. Temporal words such as "prior," however, are often unnecessary in this sense, yet they are naturally understood to refer to events occurring earlier in time. See, *e.g.*, 21 U.S.C. 851(a)(1) (providing that "[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions" unless the government sets out the prior convictions in writing before trial). And even if the United States were correct, it offers no affirmative explanation for how it can get from "prior occasion[]" to a prior dismissal *in a different suit*—much less for how that interpretation is unambiguously compelled by the statutory text.

4. With little to say about the actual text of Section 1915(g), respondents and the United States primarily argue that this Court should read into the statute a requirement that a dismissal immediately counts as a strike in some or all circumstances. See Resp. Br. 24-27, 32-35; U.S. Br. 14-17. But as petitioner has explained, where a statute "says nothing explicitly" about the issue in question, "such silence * * * normally creates ambiguity[;] [i]t does not resolve it." *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002). Respondents' and the United States' contrary arguments are unavailing.

a. Respondents and the United States note that, in a variety of other statutory provisions, Congress has expressly addressed the issue of when an order or judgment should have particular legal consequences. See Resp. Br. 24-27; U.S. Br. 15-17. That is true—in both directions. In some contexts, Congress has attached legal consequences immediately upon entry of the order or judgment. See, *e.g.*, Fed. R. Evid. 609(e) (providing that a witness's character may be attacked by evidence of a criminal conviction "even if an appeal is pending" from

the conviction). In other contexts, Congress has deferred legal consequences until after the order or judgment becomes final on appeal. See, *e.g.*, 21 U.S.C. 841(b) (imposing a higher minimum sentence for distributing a controlled substance if "[a] person commits such a violation after a prior conviction for a felony drug offense has become final"). Those provisions stand only for the unremarkable propositions that Congress can speak unambiguously on the issue of when an order or judgment should have particular legal consequences—and that, when it does, it does so in context-specific ways. They provide little guidance about what to do where, as here, Congress does not expressly address the issue.

Selectively citing those statutes that expressly defer legal consequences until after an order or judgment becomes final on appeal, respondents and the United States contend that this Court should draw a negative inference from Congress's failure to include similar language in Section 1915(g). As this Court has made clear in the specific context of the PLRA, however, no "negative inference * * * arise[s] from the silence" of one provision of a statute, as compared with another, where the two provisions "address wholly distinct subject matters," *Martin* v. *Hadix*, 527 U.S. 343, 356 (1999), and contain "difference[s] in the[ir] formulation," *City of Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 435-436 (2002).

By way of example, respondents cite 28 U.S.C. 2244(d)(1)(A) and 2255(f)(1), the provisions establishing the limitations period for collateral review of state and federal convictions (which run from, *inter alia*, the date on which the underlying conviction becomes final). See Br. 24-27. No negative inference can be drawn from those provisions for the simple reason that they were not contained in the same statute as Section 1915(g). See,

e.g., *Johnson* v. *United States*, 559 U.S. 133, 143 (2010). Respondents cite the fact that those provisions were enacted almost simultaneously with the PLRA (Br. 26), but a negative inference is still inappropriate because the relevant provisions "evolved separately in the congressional process, only to be passed together at the last minute." *Lindh* v. *Murphy*, 521 U.S. 320, 329 (1997). The language that ultimately became Sections 2244(d)(1)(A) and 2255(f)(1) appears to have been introduced many years before the language that became Section 1915(g). Compare S. 88, 101st Cong. § 6 (1989), and S. 271, 101st Cong. § 6 (1989), with S. 1275, 104th Cong. § 4 (1995).

For its part, the United States focuses on the PLRA's automatic-stay provision, 18 U.S.C. 3626(e)(2), which addresses the operation of a court order granting prospective relief in a civil action challenging prison conditions. See Br. 17. Under that provision, a motion to terminate or modify such an order automatically stays the order until the court rules on the motion. The government argues that the automatic-stay provision "contains what the three strikes provision lacks—namely, a direct indication that Congress wanted to * * * giv[e] the party aggrieved by the judgment a right to delay its effect while challenging it." *Id.*

Section 1915(g), however, addresses entirely different subject matter from that addressed by Section 3626(e)(2), and there is no parallelism in the language of the two provisions. Whereas Section 3626(e)(2) is part of a detailed scheme for ensuring that injunctive relief with respect to prison conditions is narrowly drawn and promptly terminated, Section 1915(g) sets forth the conditions under which prisoners can obtain *in forma pauperis* status to bring claims challenging prison conditions (and other types of claims) in the first place. Neither the automatic-stay provision nor any of the other cited pro-

visions justifies ascribing intentionality to Congress's failure more explicitly to provide that a dismissal counts as a strike only when it becomes final on appeal.

b. Respondents and the United States also seek to infer the requirement that a dismissal immediately counts as a strike from certain non-statutory doctrines that attach legal consequences immediately upon the entry of an order or judgment. See Resp. Br. 32-34; U.S. Br. 14-15. As with statutes, however, there is no uniform or default rule; the non-statutory doctrines cut in both directions, with some doctrines deferring legal consequences until after an order or judgment becomes final on appeal. See, *e.g.*, *Griffith* v. *Kentucky*, 479 U.S. 314, 321 & n.6 (1987) (holding that the retroactivity of new constitutional rules of criminal procedure depends on whether the conviction is final on appeal).

The cited non-statutory doctrines, moreover, arise in readily distinguishable contexts. For example, respondents and the United States note that a judgment is ordinarily enforceable immediately, absent a stay pending appeal. See Resp. Br. 32-33; U.S. Br. 14. But the purpose of that rule is to preserve a prevailing party's right *ultimately* to enforce a favorable judgment. For example, as to money judgments, if an appellant posts a bond—thereby "assur[ing] * * * that sheer passage of time will not render the judgment uncollectible"—the appellant is entitled to a stay as a matter of right and will not be required to "pay the judgment before its validity has been finally determined." *Donovan* v. *Fall River Foundry Co.*, 696 F.2d 524, 526 (7th Cir. 1982); see Fed. R. Civ. P. 62(d). Here, by contrast, there is no question that a qualifying dismissal will *ultimately* count as a strike if it is affirmed on appeal; the only question is whether such a dismissal will *also* (and automatically) count as a strike in the interim.

Like the Sixth Circuit, respondents and the United States also rely on the doctrine of res judicata or claim preclusion, which, in some jurisdictions, prevents parties from relitigating claims in another lawsuit after judgment has been entered in a lawsuit between the parties. See Resp. Br. 33-34; U.S. Br. 14-15. But as petitioner has explained (Br. 31), that doctrine serves the purpose of preventing the losing party in the initial lawsuit from getting a second bite at the apple, whereas Section 1915(g) serves the distinct purpose of preventing a prisoner from pursuing *any* additional lawsuits *in forma pauperis*, however unrelated the claims in those lawsuits might be.[2] Given their distinct contexts, the cited nonstatutory doctrines provide no valid basis for reading into Section 1915(g) a requirement that a dismissal immediately counts as a strike.

5. The PLRA's underlying purposes, as expressed in the text and legislative history, support the conclusion that Congress did not intend for a dismissal to count as a strike until it becomes final on appeal. Respondents and the United States do not dispute that, as the text indicates, Congress intended the PLRA's "three strikes" provision to penalize only prisoner litigation that is "frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. 1915(g). Nor do they seriously dispute that counting a dismissal as a strike while it is still pending on appeal poses "a risk of inadvertently

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[2] Although the United States contends (Br. 27) that a judgment may not be accorded preclusive effect where the precluded party is unable to obtain appellate review, that principle appears to apply only to *issue* preclusion, which requires the precluded party to have had a full and fair opportunity to litigate the relevant issue. See *Standefer* v. *United States*, 447 U.S. 10, 22-23 & n.18 (1980).

punishing nonculpable conduct," contrary to Congress's stated intent. *Adepegba*, 103 F.3d at 387.

The interpretation of the "three strikes" provision that most faithfully hews to Congress's intent is the one that waits until appellate review is complete before counting a dismissal as a strike. Because that approach is a textually permissible interpretation, indeed the best one, of the language Congress used in Section 1915(g), this Court should follow the vast majority of the courts of appeals and adopt it.

B. Counting A Dismissal As A Strike Only Once It Becomes Final On Appeal Is An Administrable Rule That Accords With Common Sense And Avoids Anomalous Results

As petitioner has explained (Br. 21), considerations of workability and administrability are highly relevant to interpreting a statute, such as Section 1915(g), that governs the processing of lawsuits by federal courts. Respondents and the United States do not seriously dispute that the majority interpretation, under which a dismissal counts as a strike only once it has become final on appeal, is readily administrable; as the United States puts it, that is "a task with which district courts are already quite familiar." Br. 25. Instead, they contend that their alternative interpretations, under which a dismissal immediately counts as a strike in some or all circumstances, are equally administrable. See Resp. Br. 46-50; U.S. Br. 20-25. Those contentions lack merit.

1. Respondents and the United States do not dispute that, under their interpretations, a prisoner could go from having three strikes (and being barred from proceeding *in forma pauperis*) to having two strikes (and being unbarred). That is because, if a dismissal can immediately count as a third strike, a prisoner could lose

that strike if the dismissal is reversed or modified on appeal.

This case well illustrates the potential oddity of that approach. Consider *Kinnunen*, the lawsuit that resulted in petitioner's second strike. See J.A. 46-49. The district court initially dismissed the lawsuit for failure to state a claim. Under the dynamic approach to strike counting advocated by respondents and the United States, if that had been petitioner's third such dismissal, petitioner would have accumulated three strikes at that point and been barred from proceeding *in forma pauperis* in future proceedings (and potentially even on appeal). The court of appeals then vacated in part and remanded for further proceedings. Under the dynamic approach, petitioner would no longer have had three strikes, and the bar would have been lifted. On remand, however, the district court again dismissed for failure to state a claim. Under the dynamic approach, petitioner would again have had three strikes and been barred. Nothing in the statute suggests that Congress contemplated such a dizzying process, under which a prisoner would be barred from proceeding *in forma pauperis* one day but not the next. To the contrary, the evident premise of the "three strikes" provision is that, once a prisoner reaches three strikes, he is barred from claiming *in forma pauperis* status for the entirety of his remaining term of imprisonment. See 28 U.S.C. 1915(g).

2. Beyond that incongruity, respondents' and the United States' interpretations would have pernicious consequences in two principal respects.

a. As petitioner has explained (Br. 22-23), those interpretations could bar a prisoner from proceeding *in forma pauperis* in a fourth, potentially meritorious, lawsuit where a dismissal that counts as a third strike is later reversed or modified on appeal. While the appeal is

pending, the running of the limitations period on the claims in the fourth suit could bar the prisoner from pursuing those claims altogether.

Respondents acknowledge that their interpretation of Section 1915(g) could give rise to that deeply troubling scenario. Br. 50. The United States does the same, but asserts that a prisoner caught in that scenario "is not without recourse" because the prisoner could move to reopen the fourth suit under Federal Rule of Civil Procedure 60(b)(5) on the ground that the order denying *in forma pauperis* status was "based on an earlier judgment that has been reversed or vacated." Br. 23.

It is questionable, however, whether a prisoner with expired claims would be able to obtain relief under Rule 60(b)(5). That provision is generally understood to reach only "cases in which the present judgment is based on the prior judgment in the sense of claim or issue preclusion." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2863, at 451-453 (3d ed. 2012). In addition, a prisoner can lose a strike not only where a court of appeals "reverse[s]" or "vacate[s]" the earlier judgment ordering dismissal, but also where the court of appeals affirms the judgment but rejects the district court's characterization of the suit as a qualifying dismissal under Section 1915(g). See, *e.g.*, *Munn* v. *Martin*, 502 Fed. Appx. 627, 627 (8th Cir. 2013); *Bennett* v. *Cannon*, 206 Fed. Appx. 311, 312 (4th Cir. 2006); *Stafford* v. *Brown*, 114 Fed. Appx. 769, 769-770 (8th Cir. 2004). Rule 60(b)(5) would indisputably be unavailable in the latter circumstance.

It is also questionable whether reopening would serve to eliminate the limitations bar. The United States contends that a case that has been reopened under Rule 60(b) is reinstated as of the date on which it was originally filed. See Br. 23. In the specific context of the denial

of *in forma pauperis* status, however, some courts have held that a later filing (such as a paid complaint) does not relate back to the date of the constructive filing of the initial complaint, because the denial of *in forma pauperis* status ends the tolling afforded by that "filing." See, *e.g.*, *Williams-Guice* v. *Board of Education of Chicago*, 45 F.3d 161, 162-165 (7th Cir. 1995); *Jarrett* v. *US Sprint Communications Co.*, 22 F.3d 256, 259 (10th Cir. 1994).

It is thus far from clear that Rule 60(b)(5) would afford relief in cases in which a prisoner is erroneously barred from proceeding *in forma pauperis* in a fourth or successive lawsuit. And even if it would, requiring a prisoner to jump through that additional hoop would hardly serve the interest in judicial efficiency underlying the PLRA. In previously urging adoption of petitioner's interpretation, the United States said it best: a contrary interpretation would "create[] more work than is appropriate for either the courts or the litigants to resolve a request for [*in forma pauperis*] privileges." Br. of Appellees at 24, *Thompson*, *supra*.

b. As petitioner has explained (Br. 23-25), a contrary interpretation would also introduce needless complexity and inefficiency into a statute that was intended to reduce, not increase, the courts' work in processing prisoner litigation.

To be sure, as the United States notes (Br. 24-25), under any of the available interpretations, a court calculating strikes while a third qualifying dismissal is pending on appeal will have to check on the status of the appeal. Under the majority interpretation, however, once the dismissal becomes final on appeal, the prisoner will have three strikes and be out. That approach has an obvious and undisputed practical advantage: a court will be able to rely on a determination from a previous case that a given prisoner has three strikes when assessing the

prisoner's eligibility for *in forma pauperis* status in a later case.

Under a contrary interpretation, by contrast, a court will not be able to take a previous determination for granted, but will instead have to conduct its own assessment to ensure that intervening activity has not returned the prisoner to two strikes. And even if a court were to determine that the prisoner has three strikes, that will not necessarily be the end of the matter. If the fourth suit is dismissed without prejudice for want of prosecution, the prisoner will retain the ability to refile the suit if the dismissal that counted as the third strike is reversed or modified on appeal. If the prisoner does refile (and the limitations period has not yet run), the court would be required to reassess whether the prisoner has three strikes at that time. Again, the perverse result is more work for the courts, under a statute that was intended to promote judicial efficiency.

3. As noted above, respondents take a more extreme position than the United States, immediately counting a district court's dismissal of a lawsuit as a strike even on appeal from that very dismissal. As the United States correctly notes, however, that approach is not "consistent with common practice, in which a litigant is permitted an appeal as of right from any adverse district court ruling that is final." Br. 26-27. If Congress had intended effectively to abrogate the right to appeal in a category of cases, "it would have clearly said so." *Thompson*, 492 F.3d at 432. Indeed, as respondents acknowledge (Br. 38), Congress did provide such a clear statement elsewhere in Section 1915, when it provided that *in forma pauperis* status should be denied on appeal "if the trial court certifies in writing that [the appeal] is not taken in good faith." 28 U.S.C. 1915(a)(3). The absence of such a clear statement in Section 1915(g)

strongly suggests that Congress did not intend to deny *in forma pauperis* status on appeal from *every* dismissal that counts as a third strike—a result that would "ossify district court errors," *Adepegba*, 103 F.3d at 388, and would be "unreasonably severe in light of congressional intent to foster meritorious prisoner lawsuits," *Henslee* v. *Keller*, 681 F.3d 538, 542 n.9 (4th Cir. 2012).

Remarkably, respondents do not seem troubled by the harsh results of their interpretation. They claim that it "simply returns [a prisoner] to the place of the ordinary American citizen who must pay the filing fee before filing." Br. 38. But that analogy is obviously misplaced. A prisoner is more closely analogous to an *indigent* citizen, who retains the right to proceed *in forma pauperis* on appeal. While the PLRA imposes certain obligations on prisoners who qualify for *in forma pauperis* status, there is no indication that Congress intended to prevent prisoners from obtaining appellate review of an order that has the effect of denying them *in forma pauperis* status in future litigation.

Not to worry, say respondents: a prisoner who wishes to appeal from a third-strike dismissal need only "buckle down to earn the money before the limitations period ends." Br. 50. Especially coming from a State, that is a breathtakingly disingenuous suggestion. Petitioner earns 17½ cents per hour working in the kitchen at Michigan's St. Louis Correctional Facility, where he is currently incarcerated. Even assuming that petitioner could put aside every penny he earns to pay for filing fees, and that he is permitted to work the regulatory maximum of 30 hours every week, it would take him *almost two years* to pay the appellate filing fee of $505. See Pet. Br. 6.

In any event, prisoners such as petitioner cannot put aside every penny. In Michigan, prisoners are required

to pay for, *inter alia*, restitution, fees for medical services, and institutional debts (including for the purchase of such basics as toothpaste) before they are allowed to withdraw funds for "discretionary" spending. See Michigan Department of Corrections, Policy Directive 04.02.105, at 5 (¶ V) (Jan. 1, 2010). And contrary to respondents' assertion (Br. 40), materials for litigation, such as writing materials, photocopies, and postage, are not free in Michigan prisons. See Policy Directive 05.03.116, at 1 (¶ F), 3 (¶ M) (Oct. 17, 2014); Policy Directive 05.03.118, at 2 (¶ H) (Sept. 14, 2009). Prisoners thus cannot simply "buckle down"; if they are denied *in forma pauperis* status, they will effectively be barred from bringing suit.[3]

4. Ultimately, respondents and the United States agree that resolution of the question presented here affects only a small subset of cases. See Br. in Opp. 4, 6-7; U.S. Br. 21-23. And numerous other restrictions imposed by the PLRA—including, *inter alia*, the requirement for installment payments of the filing fee and the screening mechanisms for meritless claims and appeals, see 28 U.S.C. 1915(a)(3), (b), 1915A—ensure that federal courts are able to control their dockets and efficiently dispose of meritless cases. See Profs. Br. 13-19. While petitioner's interpretation of Section 1915(g) has been the law in seven federal circuits (and seemingly the law in three others), neither respondents nor the United States identifies any problems stemming from that approach.

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[3] Nor is it realistic for respondents to suggest that a prisoner need only "borrow from a lawyer." Br. 50. Given the economic realities of prisoner litigation, the vast majority of prisoners are unable to obtain a lawyer. See Profs. Br. 17-18.

Instead, respondents and the United States are left to argue that their interpretations are consistent with Congress's purpose of curtailing prisoner litigation. See Resp. Br. 5-6; U.S. Br. 3. But no legislation pursues its purpose, much less such a broad one, at all costs.[4] The majority interpretation comports with Congress's more precisely stated purpose of filtering out *meritless* prisoner litigation; courts have had no difficulty administering it; and it avoids the unjust and anomalous results that necessarily flow from any contrary interpretation.

Neither respondents nor the United States offers a compelling reason for this Court to disagree with the overwhelming majority of the courts of appeals and to upset their well-established practice of treating dismissals as strikes only when they have become final on appeal. The Sixth Circuit's decision is an outlier whose reasoning neither respondents nor the United States defends. This Court should adopt the majority interpretation and reverse the Sixth Circuit's judgments, thereby enabling petitioner to proceed *in forma pauperis* on remand in the district court.

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[4] In any event, other provisions of the PLRA have substantially reduced the volume of prisoner litigation. See NACDL Br. 17-18; Profs. Br. 10-13.

* * * * *

The judgments of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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ANDRE LEE COLEMAN, AKA ANDRE LEE COLEMAN-BEY, PETITIONER

v.

TODD TOLLEFSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether, under the Prison Litigation Reform Act's "three strikes" provision, 28 U.S.C. 1915(g), a district court's dismissal of an action counts as a strike while the dismissal is pending on appeal or before the time for an appeal has run.

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In the Supreme Court of the United States

No. 13-1333

ANDRE LEE COLEMAN, AKA ANDRE LEE COLEMAN-BEY, PETITIONER

v.

TODD TOLLEFSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents the question whether, under the Prison Litigation Reform Act's "three strikes" provision, 28 U.S.C. 1915(g), a district court's dismissal of an action counts as a strike while the dismissal is pending on appeal or before the time for an appeal has run. The United States has a substantial interest in the resolution of that question. Inmates frequently file suits against the United States, the Bureau of Prisons, or prison officials in actions arising from conditions of confinement in federal correctional institutions. See *Porter* v. *Nussle*, 534 U.S. 516, 524-525 (2002). The United States also has primary responsibility for enforcing several federal laws that protect the civil and constitutional rights of inmates, see, *e.g.*,

Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, which often form the basis for prisoner suits. The United States has participated as *amicus curiae* in prior cases involving the statute's interpretation. See *Woodford* v. *Ngo*, 548 U.S. 81 (2006); *Porter*, *supra*; *Booth* v. *Churner*, 532 U.S. 731 (2001); *Miller* v. *French*, 530 U.S. 327 (2000).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. The federal *in forma pauperis* statute seeks "to ensure that indigent litigants have meaningful access to the federal courts." *Neitzke* v. *Williams*, 490 U.S. 319, 324 (1989). At the same time, Congress has recognized the potential for "abusive or captious litigation" from plaintiffs who are not made to bear the financial costs of filing suit. *Ibid.* The *in forma pauperis* provision, now codified at 28 U.S.C. 1915, strikes a balance between those competing objectives.

a. As originally enacted in 1892, the *in forma pauperis* statute permitted any citizen to "commence and prosecute to conclusion" a lawsuit in federal court "without being required to prepay fees or costs, or give security therefor before or after bringing suit." Act of July 20, 1892 (1892 Act), ch. 209, § 1, 27 Stat. 252. To qualify, a litigant was required to file "a statement under oath" attesting to his inability to pay and affirming his belief that "he is entitled to the redress he seeks." *Ibid.* This affidavit requirement, through which an indigent litigant "expose[d] himself 'to the pains of perjury in a case of bad faith,'" served

as "a sanction important in protection of the public" against abuse of the law's benefits. *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 338 (1948) (quoting *Pothier* v. *Rodman*, 261 U.S. 307, 309 (1923)). The statute also included a judicial safeguard, empowering a court to "dismiss any such cause * * * if said court be satisfied that the alleged cause of action is frivolous or malicious." 1892 Act § 4, 27 Stat. 252.

The original statute applied only to proceedings in the trial court. See *Bradford* v. *Southern Ry. Co.*, 195 U.S. 243, 247 (1904). But Congress subsequently amended the statute to include "an appeal to the circuit court of appeals." Act of June 25, 1910, ch. 435, 36 Stat. 866. Later, Congress added a provision precluding *in forma pauperis* status on appeal "if the trial court certifies in writing that [the appeal] is not taken in good faith." Act of June 25, 1948, ch. 646, 62 Stat. 954 (28 U.S.C. 1915(a)(3)).

b. By the mid-1990s, Congress had become concerned about the "sharp rise in prisoner litigation in the federal courts." *Woodford* v. *Ngo*, 548 U.S. 81, 84 (2006). In 1994, for instance, more than 39,000 lawsuits were filed by inmates in federal courts, "a staggering 15 percent increase over the number filed the previous year." 141 Cong. Rec. 26,553 (1995) (statement of Sen. Hatch). Existing protections had proven ineffective at stopping prisoners from filing frivolous lawsuits, "[t]he crushing burden" of which "ma[de] it difficult for courts to consider meritorious claims." *Ibid.*; see *Jones* v. *Bock*, 549 U.S. 199, 203 (2007) ("The challenge lies in ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit.").

Congress's response to this rising tide of prisoner suits was the Prison Litigation Reform Act of 1995 (PLRA), §§ 801-810, 110 Stat. 1321-66 to 1321-77. The PLRA contains "a variety of reforms designed to filter out the bad claims and facilitate consideration of the good." *Jones*, 549 U.S. at 204; see *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002) ("reduce the quantity and improve the quality of prisoner suits"). Among other things, the PLRA adopted a mandatory administrative exhaustion provision for all prisoner suits. 42 U.S.C. 1997e (2012 & Supp. I 2013). It also imposed an early screening requirement: Even before a responsive pleading has been filed, a district court must review any prisoner complaint "seek[ing] redress from a governmental entity or officer," and must dismiss the complaint or any claim that "(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. 1915A(a) and (b); see 42 U.S.C. 1997e(c)(1) (similar). A similar provision, applicable to all *in forma pauperis* suits, requires dismissal "at any time" of an action or appeal that meets one of those criteria. 28 U.S.C. 1915(e)(2)(B).

The PLRA also amended the federal *in forma pauperis* statute itself to require special treatment for prisoner claims. First, unlike other indigent plaintiffs, prisoners are "required to pay the full amount of a filing fee." 28 U.S.C. 1915(b)(1). A prisoner who has any funds must make an initial payment equivalent to 20% of the prisoner's average income or account balance, and must continue to make monthly payments "until the filing fees are paid." 28 U.S.C. 1915(b)(1) and (2). Any costs assessed at the conclusion of the

litigation must be paid in a similar manner. 28 U.S.C. 1915(f)(2). A prisoner's lack of assets and inability to pay the initial partial filing fee, however, may not prevent a prisoner from filing a suit or appeal. 28 U.S.C. 1915(b)(4).

Second, even if a prisoner has been granted permission to proceed *in forma pauperis* in the district court, the prisoner again must apply for permission—and must begin prepaying fees—before filing an appeal. 28 U.S.C. 1915(a)(2) and (b); see 16AA Charles Alan Wright et al., *Federal Practice and Procedure* § 3970 (4th ed. 2008 & Supp. 2014) (Wright & Miller). Other litigants, by contrast, can normally rely on a district court's grant of *in forma pauperis* status as carrying through on appeal "without further authorization." Fed. R. App. P 24(a)(3).

Third, the PLRA contains what has come to be known as its "three strikes" provision:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. 1915(g). The three grounds for imposing a "strike"—the filing of a federal action or appeal that "is frivolous, malicious, or fails to state a claim upon which relief may be granted"—thus mirror three of the bases for dismissing a prisoner complaint after early screening, see 28 U.S.C. 1915A(b)(1), or for

dismissing any *in forma pauperis* action or appeal, see 28 U.S.C. 1915(e)(2)(B)(i) and (ii).

2. a. Petitioner is an inmate in the Baraga Correctional Facility, a Michigan state prison. Petitioner has filed at least fourteen lawsuits while incarcerated.[1] In December 2010, petitioner filed the lead suit in this case, a civil action under 42 U.S.C. 1983 against respondent Todd Tollefson and five other Baraga employees in their individual capacities. Pet. 5. Petitioner alleged that the defendants, due to their "racial animus and shiftless work habits," had unconstitutionally interfered with his access to the courts by rejecting his grievances and failing to deliver photocopies of his legal filings. *Tollefson* Compl. 2, 11-12.

Petitioner moved the district court for leave to proceed *in forma pauperis*, but the court denied the motion based on the PLRA's three strikes provision. Pet. App. 17a-20a. The court identified three of petitioner's prior suits that had been dismissed for failure to state a claim. *Id.* at 19a (citing *Sweeney*, *Kinnunen*, and *Lentin*). It also noted that petitioner did not qualify for the "imminent danger" exception. *Id.* at 19a-20a. The court accordingly ruled that petitioner

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[1] *Coleman* v. *Lentin*, No. 92-cv-120 (W.D. Mich.); *Coleman* v. *Bouchard*, No. 04-cv-268 (W.D. Mich.); *Coleman* v. *Dahlstrom*, No. 05-cv-30 (W.D. Mich.); *Coleman* v. *Gerth*, No. 05-cv-158 (W.D. Mich.); *Coleman* v. *Kinnunen*, No. 05-cv-256 (W.D. Mich.); *Brown* v. *Granholm*, No. 06-cv-12485 (E.D. Mich.); *Percival* v. *Girard*, No. 08-cv-12374 (E.D. Mich.); *Coleman* v. *Trierweiler*, No. 09-cv-5 (W.D. Mich.); *Coleman* v. *Bowerman*, No. 09-cv-24 (W.D. Mich.); *Coleman* v. *Sweeney*, No. 09-cv-178 (W.D. Mich.); *Coleman* v. *Bowerman*, No. 10-cv-322 (W.D. Mich.); *Coleman* v. *Tollefson*, No. 10-cv-337 (W.D. Mich.); *Coleman* v. *Vroman*, No. 10-cv-354 (W.D. Mich.); *Coleman* v. *Dykehouse*, No. 11-cv-108 (W.D. Mich.).

would not be permitted to file his suit without first paying the entire $350 filing fee. *Id.* at 20a.

Petitioner moved for reconsideration, arguing that the third of the dismissals (*Sweeney*) should not be considered a strike because it was then still on appeal. Pet. App. 23a. The district court denied the motion, noting that "[t]he language of § 1915(g) is clear, and it does not make an exception for a dismissal that has been appealed." *Ibid.* The court also observed that "a judgment of dismissal by a district court is final and should be given full effect." *Ibid.* After petitioner failed to pay the filing fee within the allotted time, the court dismissed his suit. *Id.* at 2a. Petitioner moved the court for leave to proceed *in forma pauperis* on appeal, which was granted. *Ibid.*

On appeal, a divided Sixth Circuit panel affirmed the district court's dismissal of petitioner's complaint. Pet. App. 1a-14a. The majority relied on the plain language of the three strikes provision, which "does not say that [a] dismissal must be final in all of the courts of the United States" in order to count as a PLRA "strike." *Id.* at 4a (citation omitted). The majority also noted that its approach was "consistent with how judgments are treated for purposes of res judicata," because "cases on appeal have preclusive effect until they are reversed or vacated." *Id.* at 5a. Judge Daughtrey dissented, arguing that it would be "more compelling and more fair" to count a district court dismissal as a strike only after the plaintiff has exhausted or waived his appellate rights. *Id.* at 9a.

b. Within months of filing his *Tollefson* complaint, petitioner filed three additional Section 1983 actions in the United States District Court for the Western District of Michigan. Pet. App. 32a (*Bowerman*), *id.*

at 42a (*Dykehouse*); *id.* at 52a (*Vroman*). In each of those actions, petitioner's request for *in forma pauperis* status was rejected based on the three strikes provision. *Id.* at 35a, 45a, 54a. Petitioner failed to pay the filing fee, and his suits were dismissed for want of prosecution. The district court also denied petitioner leave to proceed *in forma pauperis* on appeal. *Id.* at 27a, 37a, 47a.

Petitioner appealed all three dismissals, seeking permission from the Sixth Circuit to proceed *in forma pauperis* on appeal. Pet. App. 26a, 36a, 46a. Relying on its ruling in the *Tollefson* case, the court of appeals denied petitioner's requests. *Id.* at 28a-29a, 38a-39a, 48a-49a. The court ultimately dismissed each appeal for failure to pay the required filing fee. *Id.* at 30a, 40a, 50a.

In March 2011, after petitioner's *Tollefson*, *Bowerman*, *Dykehouse*, and *Vroman* complaints had all already been filed, the Sixth Circuit affirmed in *Sweeney* (his third strike). In a four-page order, the court of appeals concluded "that the district court properly dismissed [petitioner's] complaint." 09-2419 Docket entry No. (Dkt. No.) 36-1, at 2 (Mar. 29, 2011).

SUMMARY OF ARGUMENT

Under the PLRA's three strikes provision, 28 U.S.C. 1915(g), a district court dismissal counts as a strike even while the dismissal is pending appeal or the time for an appeal has not yet run.

A. The three strikes bar goes into effect when a prisoner has, on "3 or more prior occasions," accumulated a qualifying "dismiss[al]" of an action or appeal. 28 U.S.C. 1915(g). Under the plain language of the statute, therefore, each such dismissal is an occasion, and the ban becomes effective upon the third one—

regardless whether it occurred at the trial or appellate stage. There is no indication that Congress intended the ban to become operative at some other, unspecified time, such as when the appellate process has concluded.

This reading, which gives immediate effect to a district court dismissal, is consistent with the ordinary treatment of trial court judgments: Unless they are stayed, such judgments are effective as soon as they are issued—including for purposes of preclusion in separate suits—even if the losing party intends to appeal or has filed an appeal. When Congress wishes to delay the effect of a judgment until completion of the appeals process, by contrast, it says so explicitly. See, *e.g.*, 11 U.S.C. 362(n)(1)(B); 18 U.S.C. 3288; 42 U.S.C. 14132(d)(1)(A) and (C). Indeed, a different PLRA provision, 18 U.S.C. 3626(e)(2), allows certain parties aggrieved by a district court's grant of injunctive relief to delay the judgment's effect while challenging it. The absence of similar language in the three strikes provision specifying a delay for the appellate process is particularly telling. See *Jones* v. *Bock*, 549 U.S. 199, 216 (2007) ("[W]hen Congress meant to depart from the usual procedural requirements, it did so expressly.").

Petitioner proposes an alternate reading of the statute under which a district court dismissal and the appeal from that dismissal are treated as a "single 'occasion,'" such that the ban only goes into effect "when the appeal from the dismissal has run its course." Pet. Br. 19. That reading cannot be squared with the text, which repeatedly makes clear that the trial and appellate stages are distinct. See 28 U.S.C. 1915(a)(2), (a)(3), (b)(1) and (e)(2)(B). The three

strikes provision also treats a qualifying appellate dismissal as an "occasion" in its own right, 28 U.S.C. 1915(g) ("an action *or appeal* * * * that was dismissed" on one of three specified grounds) (emphasis added); a single lawsuit can thus give rise to two strikes if dismissal occurs at both the trial and appellate stages. That would not be possible if petitioner's "single occasion" theory were correct.

B. Practical and constitutional considerations do not justify abandoning a literal interpretation in favor of petitioner's.

Petitioner argues that reading the three strikes provision to include an implicit delay for the appellate process serves the statute's "underlying purposes." Pet. Br. 19. Even if courts were free to deviate from the PLRA's text "on the basis of perceived policy concerns," *Jones*, 549 U.S. at 212, however, petitioner's policy concerns do not justify a departure from the text here.

Without identifying any examples, petitioner hypothesizes that a fourth suit might be foreclosed on the basis of a third strike that is subsequently reversed on appeal. Such a situation is likely to be exceedingly rare. But even in those instances of a third-strike reversal, a prisoner can move under Federal Rule of Civil Procedure 60(b)(5) to reopen any case that has been dismissed on the basis of the now-reversed third strike. Moreover, a suit reopened under Rule 60(b) is "reinstated as of the date it was originally filed," *Jordan* v. *United States*, 694 F.2d 833, 837 (D.C. Cir. 1982), alleviating any statute-of-limitations concerns.

Nor do administrability concerns help petitioner here. Both approaches are easily applied: Under ei-

ther, a third strike can always be relied upon to bar any later-filed suit once the strike has been affirmed on appeal. And *while* the third strike is on appeal, both approaches require a court to monitor the appellate process to determine the status of the third strike.

Petitioner argues that reading the PLRA in this manner would prevent a prisoner from appealing *in forma pauperis* from a district court dismissal that is given immediate effect as his third strike. That is incorrect. The bar only applies on appeal if the appellate court determines that the prisoner has received strikes on three "*prior* occasions," and an earlier stage of the same case is not "prior" in the sense contemplated by the statute. Allowing a prisoner to proceed *in forma pauperis* on appeal from his third strike is also consistent with ordinary practice, under which a district court judgment is not given preclusive effect if circumstances render the judgment unreviewable. There is no need, therefore, to deviate from the text in order to "mitigate the harshness" (Pet. Br. 13) of a literal reading of the statute.

Finally, a literal reading of the statute does not raise constitutional concerns, as petitioner's amicus (but not petitioner) argues. As every appellate court to consider the issue has held, Congress has reasonably and permissibly declined to subsidize the litigation activity of prisoners who abuse the availability of *in forma pauperis* status. And the precise issue here—whether to give immediate effect under the PLRA to a third qualifying dismissal—does not have constitutional implications.

ARGUMENT

A. The PLRA's Plain Language Requires Giving Immediate Effect To A Qualifying Dismissal

The PLRA makes "dismiss[al]" its basic unit of operation. It requires dismissal of certain actions or appeals, 28 U.S.C. 1915(e)(2), and it treats every such dismissal as a strike-triggering "occasion[]," 28 U.S.C. 1915(g). Upon the third occasion—the third qualifying dismissal—the ban goes into effect to prevent a prisoner from proceeding *in forma pauperis* in later-filed suits. Giving immediate effect to a prisoner's third qualifying dismissal accords with the ordinary treatment of trial court judgments, which have effect as soon as they are issued. Petitioner's proposed alternative reading cannot be squared with the statute.

1. The three strikes provision, 28 U.S.C. 1915(g), states that "[i]n no event" shall a prisoner "bring a civil action or appeal a judgment in a civil action" *in forma pauperis* "if the prisoner has, on 3 or more prior occasions * * * brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." The statute thus indicates that the strike-triggering event (a qualifying "dismiss[al]") corresponds to the "3 or more prior occasions" that are necessary for the ban to go into effect. The obvious implication is that each such dismissal is an "occasion" that counts towards the prisoner's limit of three.

The PLRA also gives special status to dismissals by directing a court to "dismiss" an *in forma pauperis* litigant's "action or appeal" under specified circumstances—including if the action or appeal "is frivolous or malicious" or "fails to state a claim on which relief

may be granted." 28 U.S.C. 1915(e)(2)(B)(i) and (ii). Those are the same three "ground[s]" that qualify a dismissal as a PLRA strike. 28 U.S.C. 1915(g). The statute thus provides clear instructions for prisoner complaints: An action or appeal must be dismissed if it is frivolous, malicious, or fails to state a claim upon which relief may be granted; and each such dismissal counts as an "occasion" for purposes of the three strikes provision.

Because the ban goes into effect once a prisoner has accumulated "3 or more prior occasions," and because each qualifying dismissal is an occasion, it follows that the third such dismissal triggers the ban (at least insofar as any later-filed suit is concerned, see pp. 25-27, *infra*). The statute's language provides no reason to believe that the ban should go into effect at some unspecified later time. Congress's emphatic phrasing ("In no event shall") further underscores its intent that the ban should encompass all applications that fall naturally within the statute's plain meaning. Even those circuits that have adopted a contrary rule acknowledge that it runs counter to a literal reading of the provision—although they criticize the reading as "hyper-literal." *Adepegba* v. *Hammons*, 103 F.3d 383, 388 (5th Cir. 1996); see *Ball* v. *Famiglio*, 726 F.3d 448, 465 (3d Cir. 2013) (same), cert. denied, 134 S. Ct. 1547 (2014); *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1099 (9th Cir. 2011) (same).

Petitioner nevertheless argues that the effect of a dismissal should be delayed until the prisoner has appealed or waived his right to do so. Petitioner asserts that the three strikes provision is silent on this issue because it "says nothing explicitly" about whether dismissals are to be given delayed effect. Pet. Br.

17 (quoting *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002)). Yet the statute's failure to *rule out* a lag time for the appellate process does not render the statute mute about whether one is required. Cf. *Woodford* v. *Ngo*, 548 U.S. 81, 91 n.2 (2006) (rejecting the argument that the PLRA's exhaustion requirement should be read to contain an implicit exception for constitutional claims). Having chosen one specific method for triggering strikes—namely, a qualifying "dismiss[al]" by a district court or court of appeals—Congress was not required to disclaim all others. See *Jones* v. *Bock*, 549 U.S. 199, 217 (2007) (declining to adopt a "procedural rule [that] lacks a textual basis in the PLRA").[2]

2. Giving immediate effect under the PLRA to qualifying dismissals is also consistent with the ordinary treatment of trial court judgments. Such judgments, unless they are stayed, normally become effective regardless of the losing party's intention to appeal. See Fed. R. Civ. P. 62(a); see also 18A Wright & Miller § 4433, 79-82 (2d ed. 2002) ("[T]he fact that an appeal is pending may not prevent an action to register or enforce the prior judgment."). Trial court rulings are also ordinarily given immediate preclusive effect in later-filed suits, irrespective of any pending or intended appeal. See *id.* § 4433, at 78 ("The bare act of taking an appeal is no more effective to defeat

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[2] In a prior case, the United States filed a brief "largely agree[ing]" with the position that petitioner takes here regarding whether a district court dismissal counts as a strike pending appeal. Gov't C.A. Br. at 24, *Thompson* v. *DEA*, 492 F.3d 428 (D.C. Cir. 2007). The brief's discussion of the issue was perfunctory and did not contain any textual analysis.

preclusion than a failure to appeal.").[3] As this Court has explained in interpreting another PLRA provision, courts should follow "the usual practice under the Federal Rules" unless the statute provides otherwise. *Jones*, 549 U.S. at 212. In this context, that means affording a district court dismissal full effect unless and until it is overturned on appeal.

When Congress *does* want to give delayed effect to a district court dismissal, by contrast, it does so explicitly. See, *e.g.*, 11 U.S.C. 362(n)(1)(B) (no automatic bankruptcy stay if the debtor "was a debtor in a small business case that *was dismissed* for any reason *by an order that became final*" within a specified period) (emphasis added); 18 U.S.C. 3288 (new criminal charges may be filed "within six calendar months of the date of the dismissal of the indictment or information, or, *in the event of an appeal*, within 60 days of *the date the dismissal of the indictment or information becomes final*") (emphasis added); 42 U.S.C. 14132(d)(1)(A) and (C) (expungement of DNA records based on "a final court order establishing that such charge has been dismissed," but "*a court order is not 'final' if time remains for an appeal*") (emphasis added). Congress's choice not to include any such

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[3] Petitioner argues that the doctrine of claim preclusion "serves a distinct purpose" from the three strikes provision—namely, keeping the "losing party in the initial lawsuit" from getting "another bite at the apple." Pet. Br. 31. Preventing duplicative litigation is indeed a goal of claim preclusion, much as preventing frivolous litigation is a goal of the PLRA. In both cases, that goal is achieved by giving immediate effect to the trial court's judgment, rather than waiting until the losing party has had an opportunity to appeal. Moreover, claim preclusion in later-filed suits is just one of several ways in which a district court judgment is typically given immediate effect.

finality requirement in the three strikes provision is therefore telling.

The default rule—trial court judgments are given immediate effect unless Congress expressly provides otherwise—is the same in the criminal context, where numerous statutes require enhanced punishment for an offender on the basis of prior convictions. See, *e.g.*, 18 U.S.C. 924(e)(1) (mandatory-minimum sentence for offender with "three previous convictions"); 18 U.S.C. 1864(c) (use of hazardous devices on federal lands); 18 U.S.C. 2251(e) (sexual exploitation of children). These statutes allow enhanced punishment even if the prior convictions have yet to be appealed. See *Deal* v. *United States*, 508 U.S. 129, 134 (1993) (rejecting suggestion that increased penalty was permitted "only for an offense committed after a previous sentence has become final"); see also Sentencing Guidelines § 4A1.2(*l*) ("Prior sentences under appeal are counted [for criminal history purposes] except as expressly provided."); Fed. R. Evid. 609(e) (permitting impeachment of a witness by evidence of a criminal conviction "even if an appeal [of the conviction] is pending"). When Congress wishes to delay a conviction's effect until completion of the appellate process, it says so explicitly. See, *e.g.*, 21 U.S.C. 841(b) (enhanced penalty for drug offenses committed "after a prior conviction for a felony drug offense has become final"); 18 U.S.C. 1028(b)(3)(C) (identification fraud); 18 U.S.C. 1365(f)(2) (consumer-product tampering); 18 U.S.C. 3559(c)(1)(A) (serious violent felonies); see also 28 U.S.C. 2244(d)(1)(A) (statute of limitations for collateral review begins to run on "the date on which the judgment became final by the conclusion of direct

review or the expiration of the time for seeking such review").

Indeed, an especially clear contrast is offered by another PLRA provision that expressly gives delayed effect to certain district court judgments: Under the PLRA's so-called "automatic stay" provision, 18 U.S.C. 3626(e)(2), a district court's grant of prospective relief in a civil action challenging prison conditions is stayed upon the filing of a motion to terminate such relief. See *Miller* v. *French*, 530 U.S. 327, 333-334 (2000). Once the stay is triggered, the "prospective relief under the existing decree is no longer enforceable, and remains unenforceable unless and until the court makes" certain required findings. *Id.* at 348. This automatic stay provision thus contains what the three strikes provision lacks—namely, a direct indication that Congress wanted to depart from normal practice by giving the party aggrieved by the judgment a right to delay its effect while challenging it. See *id.* at 341 (finding "unmistakable" proof of Congress's intent to depart from traditional stay principles). The automatic stay provision further confirms that "when Congress meant to depart from the usual procedural requirements, it did so expressly." *Jones*, 549 U.S. at 216.

3. Petitioner offers an alternate reading of the three strikes provision under which a district court's dismissal does not by itself trigger a strike. Petitioner observes that "a court of appeals' *affirmance* of [a] dismissal does not count as a distinct strike." Pet. Br. 18. From this, petitioner reasons that the "dismissal and the ensuing appeal from that dismissal constitute a single unit—or, in the language of Section 1915(g), a single 'occasion.'" *Id.* at 18-19. Therefore,

he concludes, the strike should not be assessed until the occasion has terminated once "the appeal has completed." *Id.* at 19.

But petitioner's argument is flawed at its second step: The statute makes clear in multiple ways that the trial and appellate stages are to be treated as distinct, not as a single unit. First, a district court may certify, at the conclusion of the trial proceedings, that an appeal would not be "taken in good faith," and if so "[a]n appeal may not be taken in forma pauperis." 28 U.S.C. 1915(a)(3). Second, unlike other litigants, prisoners must seek separate permission to proceed *in forma pauperis* on appeal even if they previously were granted permission in the trial court. See 28 U.S.C. 1915(a)(2) (affidavit of indigency required to "bring a civil action *or appeal a judgment* in a civil action") (emphasis added). Third, prisoner litigants must begin prepaying appellate filing fees prior to filing any appeal, even if trial court fees were prepaid. See 28 U.S.C. 1915(b)(1). Fourth, a court is required to dismiss any "action *or appeal*" that is frivolous, malicious, or fails to state a claim. 28 U.S.C. 1915(e)(2)(B)(i) and (ii) (emphasis added). And finally, under the three strikes provision itself, a qualifying dismissal at either stage constitutes a strike-triggering occasion. See 28 U.S.C. 1915(g) ("brought an action *or appeal* * * * that was dismissed" on one of three specified grounds) (emphasis added). The statute thus repeatedly distinguishes between the trial and appellate stages, establishing separate pre-requisites and consequences for each.

Petitioner's "single occasion" theory contradicts the text in other ways as well. The court of appeals must dismiss an appeal under 28 U.S.C.

1915(e)(2)(B)(i) if it is frivolous or malicious; and when it does so, that appellate dismissal counts as an occasion in its own right. See, *e.g.*, *Cooper* v. *Trevino*, 568 Fed. Appx. 342, 343 (5th Cir. 2014) ("Our dismissal as frivolous of Cooper's appeal counts as a strike pursuant to 28 U.S.C. § 1915(g)."). Moreover, if dismissals occur at both the trial and appellate stages of the same case, then two strikes are assessed. See, *e.g.*, *Toombs* v. *Massingill*, 583 Fed. Appx. 359, 360 (5th Cir. 2014) ("The dismissal of this appeal counts as a strike under 28 U.S.C. § 1915(g), as does the district court's dismissal of the complaint as frivolous."). Petitioner's theory cannot explain how a supposed "single occasion" can give rise to two strikes.

Finally, petitioner suggests (Pet. Br. 25) that a strike does not go into effect until "the time for seeking * * * review from this Court" has elapsed. But the three strikes provision refers only to the trial and appellate stages ("bring a civil action or appeal a judgment"; "brought an action or appeal"). Even if those two separate stages were to be treated as the same "occasion," as petitioner claims, what unmentioned role would this Court's certiorari review play?

In sum, petitioner's "single occasion" theory cannot be reconciled with the statutory text. To be sure, petitioner *is* correct that "a court of appeals' *affirmance* of [a] dismissal does not count as a distinct strike." Pet. Br. 18. But that is so under the plain text of the statute—because an affirmance is not a "dismissal" and therefore not an "occasion"—not because the trial and appellate stages constitute the same occasion.

B. Practical And Constitutional Considerations Do Not Justify Deviating From A Textual Approach

Petitioner argues that "considerations of workability and administrability" counsel against giving immediate effect to a district court dismissal. Pet. Br. 21. As a primary matter, this Court has cautioned that when interpreting the PLRA, "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Jones*, 549 U.S. at 212. In any event, contrary to petitioner's arguments, following the statute's text does not create "unavoidable problems." Pet. Br. 21. In fact, it serves the PLRA's dual purposes—preventing abuse by repeat filers and facilitating consideration of valid claims—better than petitioner's alternative approach.

1. Petitioner notes that giving immediate effect to a district court dismissal means that "a later reversal on appeal could cause a prisoner to *lose* a strike: that is, to go from three strikes to two." Pet Br. 22. While the third strike is on appeal, petitioner argues, the prisoner would be barred from filing a new suit *in forma pauperis*, and the statute of limitations could potentially run on that new suit before the third strike is reversed. *Id.* at 22-23. Petitioner contrasts this "fluid approach to strike counting" with his own proposed alternative, in which a district court dismissal only ripens into a strike once it becomes final after appeal. *Id.* at 21-22. He suggests this approach is necessary to avoid "a risk of inadvertently punishing nonculpabale conduct, contrary to Congress's purposes in enacting the PLRA." *Id.* at 20 (citation and quotation marks omitted).

Petitioner's concerns are unpersuasive. First, despite petitioner's suggestion, there is nothing anomalous about giving legal consequence to a district court judgment pending appeal. Indeed, that is the norm in both the civil and criminal contexts, in which such judgments are given effect unless and until they are stayed or overturned. See 16A Wright & Miller § 3954, at 585-586 (3d ed. 2008) ("The taking of an appeal does not by itself suspend the operation or execution of a district-court judgment or order during the pendency of the appeal."); see also pp. 14-17, *supra*. Nor is it unusual for adjustments to occur in a later-filed suit if a prior judgment on which it is based has been reversed or vacated on appeal. For instance, a criminal defendant may typically move for resentencing if his sentence was enhanced on the basis of a prior conviction that is subsequently overturned. See *Johnson* v. *United States*, 544 U.S. 295, 302-303 (2005). A similar process occurs in the res judicata and collateral estoppel contexts, where a litigant can move for relief if "an earlier judgment upon which the present judgment is based has been reversed or otherwise vacated." 11 Wright & Miller § 2863, at 451 (3d ed. 2012); see 18A Wright & Miller § 4433, at 88 (2d ed. 2002) ("[A] second judgment based upon the preclusive effects of the first judgment should not stand if the first judgment is reversed.") (citing cases). What petitioner calls a "fluid approach" and a "dynamic approach," Pet. Br. 22, is in actuality just the conventional approach.

Second, the precise scenario that petitioner envisions will rarely if ever arise. It depends on the prisoner's third strike being reversed on appeal. That, however, is likely to be a rare event. The appellate

reversal rate in prisoner-filed civil suits is less than 4%[4]; and although separate statistics are not available for prisoners who have received multiple strikes, there is no reason to expect the reversal rate to be higher for repeat filers. Indeed, neither petitioner nor his amici have identified *any* instance in which a third strike was reversed on appeal, and our independent research confirms that reversals in such circumstances are rare.[5] And a third-strike reversal is not enough: The prisoner must also intend to file a *fourth* suit—one that does not qualify for the "imminent danger" exception—while the third strike is on appeal but before it is overturned. For the prisoner to

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[4] See Admin. Office of the U.S. Courts, *Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2013*, at 1 (Sept. 2013) http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B05Sep13.pdf.

[5] The United States has been able to find only two instances of a third-strike reversal, only one of which was based on an error by the district court. See *Henslee* v. *Keller*, 481 Fed. Appx. 842, 843 (4th Cir. 2012) (vacating district court dismissal as moot in light of prisoner's transfer to another prison); *King* v. *Federal Bureau of Prisons*, 415 F.3d 634, 639 (7th Cir. 2005) (finding dismissal improper as to one of two defendants). Examples of third-strike affirmances, by contrast, are plentiful. See, *e.g.*, *Childs* v. *Miller*, 713 F.3d 1262 (10th Cir. 2013); *McLean* v. *United States*, 566 F.3d 391 (4th Cir. 2009); *Vaughan* v. *Watts*, 305 Fed. Appx. 958 (4th Cir. 2009); *Cason* v. *Weeks*, 285 Fed. Appx. 75 (4th Cir. 2008); *Smith* v. *Cowman*, 208 Fed. Appx. 687 (10th Cir. 2006); *Ring* v. *Knecht*, 130 Fed. Appx. 51 (7th Cir. 2005), cert. denied, 546 U.S. 1184 (2006); *Kalinowski* v. *Bond*, 358 F.3d 978 (7th Cir.), cert. denied, 542 U.S. 907 (2004); *Boles* v. *Matthews*, 173 F.3d 854 (6th Cir. 1999) (Tbl.); see also *Orr* v. *Clements*, 688 F.3d 463, 464 (8th Cir. 2012) (denying *in forma pauperis* status on the basis of a prior third-strike affirmance); *Owens-El* v. *United States*, 49 Fed. Appx. 247, 249 (10th Cir. 2002) (same); *Allen* v. *Brown*, 166 F.3d 339 (5th Cir. 1998) (Tbl.) (same).

have suffered prejudice, moreover, the statute of limitations on the fourth action must have run in the interim. The stars are unlikely to align that way very frequently.

Even in those rare cases, the prisoner is not without recourse: Pursuant to Federal Rule of Civil Procedure 60(b)(5), the prisoner may move to reopen any case that has been dismissed on the basis of the now-reversed third strike. Rule 60(b)(5) allows a district court to relieve a party from a final judgment, order, or proceeding that is "based on an earlier judgment that has been reversed or vacated." See *Livera* v. *First Nat'l State Bank*, 879 F.2d 1186, 1190 (3d Cir.), cert. denied, 493 U.S. 937 (1989). Once granted, a motion under Rule 60(b)(5) reinstates the case as if the earlier judgment had never been rendered. See 11 Wright & Miller § 2863 n.9 (3d ed. 2012 & Supp. 2014) (citing cases); see also 47 Am. Jur. 2d *Judgments* § 714 (2006 & Supp. 2014). Moreover, a case reopened under Rule 60(b) is "reinstated as of the date it was originally filed." *Jordan* v. *United States*, 694 F.2d 833, 837 (D.C. Cir. 1982). Therefore, any fourth suit that was dismissed on the basis of a third strike can be reinstated as of its original filing date if the third strike is ultimately reversed on appeal. For that reason, petitioner is wrong to worry that "[i]n the time that it takes the court of appeals to act [on the appeal of a third strike], the limitations period could run on any claims in the fourth suit." Pet. Br. 22-23. The "pernicious consequences" that petitioner envisions (Pet. Br. 22) need not come to pass.

Finally, petitioner ignores the much more common flip-side of his hypothetical: third strikes that are *affirmed* on appeal. In such cases, petitioner's ap-

proach would allow a prisoner to file additional suits *in forma pauperis* while his third strike is pending appeal, even though the third strike was properly issued. Here, for instance, petitioner filed four complaints (*Tollefson*, *Bowerman*, *Dykehouse*, and *Vroman*) while his third dismissal (*Sweeney*) was on appeal. The Sixth Circuit ultimately affirmed the district court's dismissal in *Sweeney*, concluding "that the district court properly dismissed [petitioner's] complaint." Dkt. No. 36-1, at 2. But under petitioner's approach, that would make no difference; he would nevertheless be eligible for *in forma pauperis* status in the four later-filed suits—his eleventh, twelfth, thirteenth, and fourteenth suits overall—including on appeal. There is every reason to think that petitioner's actual litigation history would have troubled Congress more than the uncommon scenario that he hypothesizes.

2. Petitioner asserts that following the text of the three strikes provision would introduce "needless complexity and uncertainty" into the processing of prisoner litigation. Pet. Br. 23. If a strike is reversed on appeal, he argues, a court would be forced to reexamine any case in which *in forma pauperis* status had been denied on the basis of the now-reversed strike. Under his proposed alternative, by contrast, once a strike is imposed, it can be relied upon in all later-filed cases. *Id.* at 23-24.

Petitioner greatly overstates the practical benefits of his interpretation. Under either approach, a third strike can always be relied upon to bar any later-filed suit once the strike has been affirmed on appeal. And *while* the third strike is pending appeal, both approaches will require the district court to monitor the

appeals process: Under petitioner's approach, a district court faced with a fourth suit will have to check the appellate status of the third strike, which becomes effective only once the appeal is complete. Under a literal approach to the statute, a district court will conduct the same inquiry, with the third strike taking effect unless it has been reversed. A straightforward inquiry into the appellate status of the third strike is thus necessary under either approach. As petitioner points out (Pet. Br. 25), evaluating the finality of a prior judgment is a task with which district courts are already quite familiar.

3. Petitioner argues that a literal approach to the PLRA's three strikes provision is "troubling" because it "would effectively preclude a prisoner from appealing a dismissal that would count as a third strike." Pet. Br. 26. If such a dismissal is given immediate effect as the prisoner's third strike, petitioner claims, then the bar would go into effect, and an *in forma pauperis* appeal of that very strike would be forbidden. See *ibid.* Petitioner urges this Court to not to endorse such an "anomal[ous]" result absent Congress's "unambiguous intention to limit appeals from all third qualifying dismissals." *Id.* at 27.

Petitioner is mistaken that following a literal approach to the three strikes provision would prevent a prisoner from receiving *in forma pauperis* status on appeal of a third strike. The bar goes into effect if the prisoner has received strikes "on 3 or more *prior occasions*." 28 U.S.C. 1915(g) (emphasis added). The phrase "prior occasions" is most sensibly read as referring to strikes imposed in prior-filed suits, not to those imposed in an earlier stage of the same suit. Indeed, it is hard to see what other function the word

"prior" might serve: Because "the number of strikes [is] assessed [as of] the date on which a prisoner files his complaint" or his appeal, Pet. Br. 35, the strikes will *always* be "prior" in the sense of preceding the decision whether to grant *in forma pauperis* status. Reading the phrase "prior occasions" to refer to earlier-filed suits is therefore necessary to give meaning to the word "prior." See *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) ("[W]e must give effect, if possible, to every clause and word of a statute.") (citation and quotation marks omitted).

Petitioner argues that this reading is "at war with itself," because it treats a district court's dismissal of a third suit as an "occasion" for one purpose (precluding a fourth suit) but not for another purpose (preventing the appeal of the third strike). Pet. Br. 29. That is incorrect. The district court's dismissal is an "occasion" for both purposes. But from the perspective of the court of appeals—deciding whether to grant *in forma pauperis* status on an appeal from the third strike—it is not a "*prior* occasion." For that reason, the bar does not prevent the court of appeals from granting *in forma pauperis* status on appeal of the third strike, although it would apply in any later-filed suit.[6]

This reading is consistent with common practice, in which a litigant is permitted an appeal as of right from

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[6] Petitioner is correct to reject the Sixth Circuit's view that the district court's dismissal of a third strike is "the *same* occasion" as an appeal from that strike. Pet. Br. 28 (quoting Pet. App. 6a). The district court's dismissal and the subsequent appeal are distinct occasions; but from the appellate court's perspective, the district court's dismissal is not a "prior occasion" in the sense contemplated by the statute.

any adverse district court ruling that is final. See 28 U.S.C. 1291; Fed. R. App. P. 3. It is also consistent with the typical res judicata and collateral estoppel consequences of a district court judgment. Of course, a district court's ruling has no preclusive effect in an appeal from that ruling. But it also normally has no preclusive effect on *other* civil suits absent an opportunity for appeal by the losing party—that is, as a general matter, "preclusion should not attach when circumstances cut off appeal of an otherwise reviewable order." 18A Wright & Miller § 4433, at 104 (2d ed. 2002); see *id.* § 4433, at 101 (noting "well-settled circumstances in which preclusion is defeated because rulings of a sort that ordinarily are reviewable [on appeal] cannot be reviewed in a particular setting"). Thus, "the usual practice," *Jones*, 549 U.S. at 212, is to give a district court ruling immediate preclusive effect as to all separately filed suits, but to require the availability of appellate review for that ruling itself. The three strikes provision can sensibly be read as conforming to those background principles by interpreting "prior occasions" as referring to strikes imposed in prior-filed suits, not in earlier stages of the same suit.[7]

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[7] The Seventh Circuit adopted an alternative interpretation under which the three strikes provision does bar a prisoner's *in forma pauperis* appeal of a third strike. *Robinson* v. *Powell*, 297 F.3d 540, 541 (2002). The court suggested, however, that a prisoner wishing to appeal the third strike could nevertheless seek leave to proceed *in forma pauperis* on appeal under Federal Rule of Appellate Procedure 24(a)(5). In ruling on the Rule 24(a)(5) motion, the court of appeals would determine if "the district court might have erred in dismissing [the prisoner's] complaint"; if so, the court of appeals "would permit him to proceed in forma pauperis" on appeal. *Robinson*, 297 F.3d at 541. Petitioner correctly

4. Finally, petitioner's amicus (but not petitioner) argues that reading the PLRA's three strikes provision to give immediate effect to a district court dismissal would raise "serious constitutional concerns." Constitutional Accountability Ctr. Amicus Br. 11. That argument is without merit. Prisoners undoubtedly "have a constitutional right of access to the courts," *Bounds* v. *Smith*, 430 U.S. 817, 821 (1977), and prisoner suits may serve to vindicate important constitutional interests, see, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 715-717 (2005). It does not follow, however, that prisoners must be relieved of the costs of filing suit without regard to their prior litigation misconduct. See *Shieh* v. *Kakita*, 517 U.S. 343, 343 (1996) (per curiam) (barring *in forma pauperis* filings prospectively because the petitioner "has abused this Court's certiorari process"); *Martin* v. *District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (per curiam) (similar). The PLRA's three strikes provision embodies Congress's view that federal courts should "devote [their] limited resources to the claims of [prisoners] who have not abused" the privilege of *in forma pauperis* status. *Shieh*, 517 U.S. at 344. That view is both reasonable and permissible.

Unsurprisingly, every appellate court to address the issue has held that the three strikes provision does not infringe a prisoner's constitutional right of access to the courts. See *Polanco* v. *Hopkins*, 510 F.3d 152 (2d Cir. 2007); *Abdul-Akbar* v. *McKelvie*, 239 F.3d 307

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notes (Pet. Br. 33) that the Seventh Circuit's proposal is flatly inconsistent with the PLRA. It would also require a court of appeals to reach the merits of the prisoner's suit in ruling on the Rule 24(a)(5) motion—a result that is neither sensible nor contemplated by the rule itself.

(3d Cir.) (en banc), cert. denied, 533 U.S. 953 (2001); *Carson* v. *Johnson*, 112 F.3d 818 (5th Cir. 1997); *Wilson* v. *Yaklich*, 148 F.3d 596 (6th Cir. 1998), cert. denied, 525 U.S. 1139 (1999); *Lewis* v. *Sullivan*, 279 F.3d 526 (7th Cir. 2002); *Higgins* v. *Carpenter*, 258 F.3d 797 (8th Cir. 2001), cert. denied, 535 U.S. 1040 (2002); *Rodriquez* v. *Cook*, 169 F.3d 1176 (9th Cir. 1999); *White* v. *Colorado*, 157 F.3d 1226 (10th Cir. 1998), cert. denied, 526 U.S. 1008 (1999); *Rivera* v. *Allin*, 144 F.3d 719 (11th Cir.), cert. dismissed, 524 U.S. 978 (1998).[8] And the precise question at issue here—whether a prisoner with three qualifying strikes may nevertheless file a fourth suit *in forma pauperis* while the third strike is pending appeal—is even further afield of any constitutional concerns.

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[8] Two courts of appeals have left open whether a prisoner may raise an as-applied challenge to the three strikes provision where its operation would imperil the prisoner's fundamental constitutional rights. See *Rodriguez*, 169 F.3d at 1180; *Carson*, 112 F.3d at 821. Petitioner has not raised such a challenge.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1915 provides:

Proceedings in forma pauperis

(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prose- or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist,

collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate judge in any civil or

criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636 (b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the

costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

2. 28 U.S.C. 1915A provides:

Screening

(a) SCREENING.—The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) GROUNDS FOR DISMISSAL.—On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

(c) DEFINITION.—As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
DEC 8 - 2014
OFFICE OF THE CLERK

No. 13-1333

In The

Supreme Court of the United States

ANDRÉ LEE COLEMAN-BEY, *Petitioner*,

v.

TODD TOLLEFSON, ET AL., *Respondents*.

ANDRÉ LEE COLEMAN-BEY, *Petitioner*,

v.

BERTINA BOWERMAN, ET AL., *Respondents*.

ANDRÉ LEE COLEMAN-BEY, *Petitioner*,

v.

STEVEN DYKEHOUSE, ET AL., *Respondents*.

ANDRÉ LEE COLEMAN-BEY, *Petitioner*,

v.

AARON J. VROMAN, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

SUMMARY OF ARGUMENT

Petitioner André Lee Coleman-Bey ("Coleman-Bey"), an inmate in Michigan state prison, filed a civil-rights action in the United States District Court for the Western District of Michigan, alleging that employees of the prison had violated his constitutional rights by interfering with his access to the courts. Because he did not have the resources to pay the requisite filing fees, he also moved for leave to proceed *in forma pauperis* ("IFP").

The district court denied Coleman-Bey leave to proceed IFP on the basis of the so-called "three strikes" provision of the Prison Litigation Reform Act, which denies IFP status to those prisoners who have "on 3

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

or more prior occasions, while incarcerated , brought an action or appeal in a [federal] court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted," unless they allege that they are in "imminent danger of serious physical injury." 28 U.S.C. § 1915(g). Even though one of Coleman-Bey's prior lawsuits was then on appeal and thus subject to reversal (Pet. App. 1a-2a), the district court nonetheless held that it constituted a "strike" under the PLRA. The Sixth Circuit, in a divided opinion, affirmed.

As Petitioner demonstrates in his brief, the interpretation adopted by the court below is inconsistent with the plain language of the statute, as well as settled appellate practice in the federal courts. *See* Pet'r Br. 16-19, 25; *see also, e.g.*, *Adepegba v. Hammons*, 103 F.3d 383, 387-88 (5th Cir. 1996); *Silva v. Di Vittorio*, 658 F.3d 1090, 1098, 1100 (9th Cir. 2011). *Amicus* submits this brief to demonstrate that such an interpretation also raises serious constitutional questions because, so interpreted, the three "strikes" provision of the PLRA significantly limits prisoners' ability to access the courts to present fundamental constitutional claims.

When the Framers drafted our enduring national charter, their design departed from the precursor Articles of Confederation in several key respects. One of the most critical was the establishment of the judiciary as an independent, co-equal branch of government. Article III of the new Constitution vested the "judicial power" in the federal courts and broadly extended that power to nine categories of cases and controversies. In the debates about the Constitution's ratification, Anti-Federalists bitterly attacked the new federal judiciary, but the Framers recognized

that constitutional limitations on government would be meaningless if the American people did not have the ability to vindicate their rights in the federal courts. Article III's grant of broad judicial powers to the federal courts ensured that "the Constitution should be carried into effect, that the laws should be executed, [and] justice equally done to all the community." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 160 (Davie) (Jonathan Elliot ed., 1836).

Reflecting the Framers' vision, this Court has repeatedly recognized that all people, including prisoners and the indigent, must have meaningful access to the courts to present fundamental constitutional claims. If a dismissal that can be overturned on appeal constitutes a "strike" for PLRA purposes, the statute imposes an exceptionally stringent barrier on prisoners' ability to access the courts. There is a serious question whether the PLRA, so construed, is constitutional under the Due Process and Equal Protection Clauses. These serious constitutional concerns present yet another reason—in addition to the many reasons offered by Petitioner, *see generally* Pet'r Br.—why a dismissal should not count as a strike until it has been affirmed on appeal or the time for appellate review has lapsed.

"Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land." *Bridges v. Wixon*, 326 U.S. 135, 166 (1945).

ARGUMENT

CONSISTENT WITH THE RIGHT OF ACCESS TO THE COURTS, A DISMISSAL SHOULD NOT COUNT AS A "STRIKE" UNDER THE PRISON LITIGATION REFORM ACT WHILE IT REMAINS SUBJECT TO REVERSAL ON APPEAL

Article III of the Constitution broadly extends the "judicial power" to nine categories of cases and controversies, including "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. This broad extension of judicial power reflected the Framers' belief that access to the courts was essential to protect individual liberty, prevent government abuse, and ensure compliance with the law. Consistent with this belief, this Court has repeatedly recognized that there is a constitutional right to access the courts, at least to present fundamental constitutional claims.

The so-called "three strikes" provision of the Prison Litigation Reform Act, which generally prevents a prisoner from proceeding IFP if he has "on 3 or more prior occasions, while incarcerated , brought an action or appeal in a [federal] court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted," 28 U.S.C. § 1915(g), limits prisoners' access to the courts to present fundamental constitutional claims.

The decision of the court below further limited prisoners' access to the courts by holding that a dismissal counts as a "strike" for PLRA purposes even if it is "on appeal [and thus subject to reversal] at the time" that the prisoner brings his claim. Pet. App. 4a.

Thus interpreted, the "3 strikes provision" could deny a prisoner access to the courts even if *all* of his previous suits were improperly dismissed by lower courts. *See Adepegba*, 103 F.3d at 387-88 (noting that "an indigent prisoner's fourth claim could expire while his first three dismissals were being reversed on appeal"). Such a construction of the PLRA raises serious constitutional questions in light of this Court's decisions recognizing a fundamental right to access the courts.

A. The Question Presented Implicates the Constitution's Guarantee of Meaningful Access to the Courts

Article III of the U.S. Constitution provides that "[t]he judicial Power of the United States[] shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. The Constitution's establishment of the judiciary as an independent, co-equal branch of government was a direct response to the infirmities of the Articles of Confederation, which had created a single branch of the federal government—"the United States, in Congress assembled," Articles of Confederation of 1781, art. II—and no independent court system. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 (1987) (noting that Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power"). As a result, the federal government could not enforce its laws, prompting Alexander Hamilton to observe that a "most palpable defect of the existing Confederation is the total want of a SANCTION to its laws." The Federalist No. 21, at 106 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see id.* No. 22, at 118 (Alexander Hamilton) (explaining that "[l]aws

are a dead letter without courts to expound and define their true meaning and operation").

When the Framers gathered in Philadelphia to draft the new national charter, they recognized that "there ought always to be a constitutional method of giving efficacy to constitutional provisions." *Id.* No. 80, at 443 (Alexander Hamilton). They debated at length what that method ought to be and ultimately concluded that federal courts should be given the power to enforce the Constitution's guarantees and ensure the supremacy of federal law in adjudicating cases that came before them. *See generally* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 705-73 (1998); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1346-55 (2001).[2]

To ensure that the federal courts would be up to this task, the Framers provided for an expansive federal judicial power vested in an independent judiciary. *See generally* U.S. Const. art. III (establishing independent judiciary whose members "shall hold their Offices during good Behavior"). Indeed, after the other possible methods of ensuring state compliance with federal law were rejected, the Convention substantially expanded the federal judicial power. First, the Convention approved the power of Congress to appoint lower federal courts, recognizing that "[i]nferior tribunals are essential to render the authority of the Natl. Legislature effectual." 2 *The Rec-*

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[2] The Framers also considered, but rejected, a federal negative on state laws to be exercised by Congress and the use of executive power to coerce states' compliance with federal law. *See* Liebman & Ryan, *supra*, at 705-73.

ords of the Federal Convention of 1787, at 46 (Max Farrand ed., 1911). The Convention also expanded the jurisdiction of the federal courts, making explicit in the text that the "jurisdiction [of the national Judiciary] shall extend to all cases arising under [laws passed by the general Legislature]: And to such other questions as may involve the Natl. peace & harmony." *Id.* It subsequently further expanded their jurisdiction, giving them the power to hear cases arising under "this Constitution" as well as federal laws. *Id.* at 430.

In the debates about the Constitution's ratification, Federalists and Anti-Federalists alike agreed that Article III conferred broad, substantial powers on the federal courts. Indeed, the Anti-Federalists bitterly attacked the new federal judiciary, claiming that the Supreme Court would be "exalted above all other power in the government," Brutus XV (Mar. 20, 1788), *reprinted in The Anti-Federalists Papers and the Constitutional Convention Debates* 304 (Ralph Ketcham ed., 1986), and would have "more power than any court under heaven," 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 564 (Grayson) (Jonathan Elliot ed., 1836); *id.* at 523 (Mason) (the grant of power to the federal courts was "the most extensive jurisdiction").

The Framers rejected these concerns, recognizing that constitutional limitations on government would be meaningless if individuals did not have recourse to federal courts to vindicate their rights. *See, e.g., id.* at 554 (Marshall) ("To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection."). Indeed, the existence of the federal courts to vindicate constitutional rights was a powerful argument in

favor of the adoption of the Bill of Rights: in March 1789, Thomas Jefferson wrote to James Madison that an "argument[] in favor of a declaration of rights" that carried "great weight with [him]" was the "legal check which it puts into the hands of the judiciary." Letter from Thomas Jefferson to James Madison, at 1 (March 15, 1789), *reprinted in The James Madison Papers*, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=03/mjm03.db&recNum=975&itemLink=D?mjm:9:./temp/~ammem_Bm5J::. As Madison explained in proposing the Bill of Rights that June, "[i]f the [Bill of Rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 Annals of Cong. 457 (1789) (Joseph Gales ed., 1834).

In short, Article III's grant of broad judicial powers to the federal courts ensured that "the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed." 4 *The Debates in the Several State Conventions*, *supra*, at 160 (Davie). The American people recognized that "[t]hese ends can only be accomplished by a general, paramount judiciary." *Id.*

Consistent with the Framers' vision, this Court has long recognized that "no person [should] be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). As the next section demonstrates, interpreting the PLRA to count a dismissal that is pending on appeal as a "strike" raises serious constitutional concerns in light of this fundamental principle.

B. Counting Non-Final Dismissals as "Strikes" Under the PLRA Raises Serious Constitutional Questions

As just discussed, the Framers believed that broad access to the courts was essential to protecting individual liberty and ensuring compliance with the nation's laws. *See supra* at 8-11. Reflecting the Framers' belief that a strong federal judiciary is essential to the protection of individual liberties, this Court has long recognized the important role that the courts play in ensuring fealty to the nation's laws and has ensured that indigent prisoners have full access to the courts to raise fundamental constitutional claims.

In *Griffin v. Illinois*, a plurality of this Court held that under the Equal Protection and Due Process Clauses indigent convicted defendants must be "afford[ed] adequate and effective appellate review" and thus could not be required to pay a fee for transcripts needed to appeal their convictions. 351 U.S. 12, 20 (1956). As this Court explained it, denying the indigent effective appellate review is "a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law." *Id.* at 19. This Court subsequently extended that principle to the habeas context, holding that "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Smith v. Bennett*, 365 U.S. 708, 709 (1961); *see Burns v. Ohio*, 360 U.S. 252, 258 (1959) ("The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law.").

As these cases make clear, the right to access the courts extends to prisoners. *See Bounds v. Smith*, 430 U.S. 817, 821 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts."). And the right extends beyond claims simply attacking convictions and sentences. In *McDonnell*, this Court held that the Due Process Clause "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." 418 U.S. at 579; *id.* at 579-80 (noting that there is "no reasonable distinction between" habeas and civil rights actions and that the right of court access includes litigation related to "basic constitutional rights").

The "three strikes" provision of the PLRA, by requiring even those prisoners who are bringing claims involving fundamental constitutional rights "to pay all filing fees upfront," threatens to impose a "'total barrier' to [prisoners] bringing their claims." *Thomas v. Holder*, 750 F.3d 899, 906-07 (D.C. Cir. 2014) (Tatel, J., concurring). By deeming a dismissal a "strike" even though an appellate court may ultimately reverse that determination, the court below read the PLRA to impose an even more stringent barrier on prisoners' ability to vindicate their fundamental rights in court. There is thus a serious question whether the PLRA, so construed, is constitutional under the Due Process and Equal Protection Clauses. *Cf. Thomas*, 750 F.3d at 904 (Tatel, J., concurring) (expressing "doubts" on the question whether the three strikes provision of the PLRA is constitutional); *id.* at 908 (noting that "several Courts of Appeals have left open the possibility that a prisoner might bring a successful as-applied challenge to the PLRA's three-strikes provision").

These serious constitutional concerns should inform the statutory interpretation of the PLRA's "three strikes" provision. As this Court has repeatedly recognized, "No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." *Parsons v. Bedford*, 28 U.S. 433, 448-49 (1830). Regardless whether the PLRA's "three strikes" provision is constitutional under the majority view, *see Thomas*, 750 F.3d at 904-05 (Tatel, J., concurring), it plainly raises serious constitutional concerns under the interpretation adopted by the court below. There are many reasons why the decision of the court below is wrong, *see generally* Pet'r Br., but these serious constitutional concerns—and the underlying constitutional values they reflect—present an additional reason why a dismissal should not count as a strike until it has been affirmed on appeal or the time for appellate review has lapsed.

This Court should hold that a non-final dismissal does not count as a "strike" for purposes of the PLRA's "three strikes" provision.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers, a nonprofit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of criminal law.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, NACDL frequently appears as amicus in cases involving prisoners' access to the courts.

SUMMARY OF ARGUMENT

The majority interpretation of the three-strikes provision of the Prison Litigation Reform Act of 1995 ("PLRA"), 28 U.S.C. § 1915(g), provides a clear, easily administrable rule that avoids anomalous results, introduces no further complexity, and best serves the

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[1] Letters consenting to the filing of this amicus brief have been filed with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

statute's purposes. Under that interpretation, a district court's dismissal of a prior action on one of the grounds enumerated in the statute does not qualify as a "strike" for purposes of § 1915(g) so long as that dismissal remains open on appeal. *See Henslee* v. *Keller*, 681 F.3d 538, 541 (4th Cir. 2012) (discussing circuit decisions). That rule is simple to apply and calls for a familiar analysis of finality that courts routinely conduct in other contexts. Courts have accordingly implemented that interpretation without difficulty since early after the PLRA's enactment. Moreover, that interpretation bars prisoners who repeatedly pursue frivolous litigation from proceeding under the *in forma pauperis* statute without unfairly penalizing those litigants to whom the three-strikes provision would otherwise apply only because of a prior dismissal that might turn out to be erroneous in some respect.

In contrast, the Sixth Circuit's interpretation creates needless uncertainty and raises as many questions as it answers. That interpretation, which the Seventh Circuit has also adopted, "requires district courts to count as strikes cases that are dismissed on the grounds enumerated in the provision even when pending on appeal." Pet. App. 4a; *see also Robinson* v. *Powell*, 297 F.3d 540, 541 (7th Cir. 2002). The Sixth Circuit's interpretation thus permits strikes to arise and vanish intermittently as dismissals are entered and then reversed, potentially barring meritorious claims in the interim. The Sixth Circuit's decision also creates further complications in the statute, including the question whether a prisoner may be granted *in forma pauperis* status to appeal from a dismissal that would otherwise count as a third strike.

Injecting these complexities into the administration of the PLRA serves no evident useful purpose.

The PLRA "contains a variety of provisions designed to bring [prisoner] litigation under control." *Woodford* v. *Ngo*, 548 U.S. 81, 84 (2006). Among other things, the PLRA "mandates early judicial screening of prisoner complaints and requires prisoners to exhaust prison grievance procedures before filing suit." *Jones* v. *Bock*, 549 U.S. 199, 202 (2007). The Sixth Circuit's interpretation of the three-strikes provision does not add to the effectiveness of those mechanisms, but instead threatens to extinguish meritorious claims brought by prisoners whose prior strikes could disappear on appeal. This Court should reject that interpretation and construe any ambiguity in § 1915(g) in the manner most consistent with its purpose, ease of administration, and common sense.

ARGUMENT

THE INTEREST IN EASE OF ADMINISTRATION AND THE PURPOSES OF THE PLRA FAVOR TREATING A PRIOR DISMISSAL AS A "STRIKE" ONLY AFTER IT BECOMES FINAL ON APPEAL

A. The Majority Interpretation Is A Simple Rule That Courts Have Applied Since 1996 Without Difficulty

Treating a prior dismissal as a "strike" under § 1915(g) only after it has become final on appeal provides a simple rule that courts can easily apply. Under this view, "a dismissal ripens into a 'strike' for § 1915(g) purposes on 'the date of the Supreme Court's denial or dismissal of a petition for writ of certiorari, if the prisoner filed one, or from the date when the time to file a petition for writ of certiorari expired, if he did not.'" *Silva* v. *Di Vittorio*, 658 F.3d 1090, 1100 (9th Cir. 2011) (quoting *Hafed* v. *Federal Bureau of Prisons*, 635 F.3d 1172, 1176 (10th Cir. 2011)). If a prisoner does not ap-

peal a dismissal from the district court in the first place, "the dismissal counts as a 'strike' from the date when his time to file a direct appeal expired." *Id.* at 1100 n.6. Thus, under that majority interpretation, a court applying § 1915(g) need only determine whether any appeal from a previous dismissal is pending or whether the deadline for seeking further review has passed. If an appeal is pending, or if the period for seeking further review has not yet elapsed, then the dismissal does not count as a strike for purposes of § 1915(g).

The Fifth Circuit adopted this approach shortly after the PLRA's enactment, and experience within that circuit confirms the ease of its application. In *Adepegba* v. *Hammons*, 103 F.3d 383 (5th Cir. 1996), the Fifth Circuit held that "[a] dismissal should not count against a petitioner until he has exhausted or waived his appeals." *Id.* at 387. The court reasoned that reversal of an otherwise qualifying dismissal "nullifies the 'strike.'" *Id.* From that premise—which is not contested here—the court concluded that a dismissal should not be treated as a strike so long as it might yet be "nullifie[d]" on appeal. Thus, the court held, only those dismissals for which appeal has been exhausted or waived count as strikes. *Id.* at 387-388. "Any other reading," the court explained, would "pose[] a risk of inadvertently punishing nonculpable conduct," contrary to Congress's intention "only to penalize litigation that is truly frivolous, not to freeze out meritorious claims or ossify district court errors." *Id.*

Applying the statute to the facts before it, the Fifth Circuit held that the district court's dismissal of the case at hand did not constitute a strike because Adepegba's appeal was not yet exhausted. 103 F.3d at 387. In contrast, the court had no trouble concluding that prior decisions Adepegba had failed to appeal within

the time allowed counted as strikes. *Id.* at 388 (citing 90-day deadline under S. Ct. R. 13). Based on those prior strikes, the court was able to determine, once and for all, that Adepegba was barred from pursuing any other action in federal court under the *in forma pauperis* statute unless he faced "'imminent danger of serious physical injury.'" *Id.*

District courts within the Fifth Circuit have likewise had little difficulty applying *Adepegba*'s holding. In *White* v. *City of Dallas*, 2007 WL 1793561 (N.D. Tex. June 21, 2007), the plaintiff sought to proceed *in forma pauperis* in a § 1983 suit against the Dallas Police Department. Adopting the magistrate judge's findings and conclusions, the district court identified six prior qualifying dismissals—five dismissals in the district court, plus one dismissal of a frivolous appeal. *Id.* at *2-3. For each dismissal, the court simply noted whether the plaintiff had appealed or waived his appellate rights and counted the strikes accordingly. *See id.* (precluding *in forma pauperis* status); *see also, e.g.*, *Grandinetti* v. *White*, 2007 WL 1428809, at *2 (E.D. Tex. May 10, 2007) (adopting magistrate judge's application of *Adepegba* to find at least three prior dismissals in which appeal had been exhausted or waived). Similarly, in *Few* v. *Rivera*, 2006 WL 4659838, at *1-2 (W.D. Tex. Dec. 8, 2006), a magistrate judge identified three prior qualifying dismissals, but the district court noted that the plaintiff's appeal from one of those dismissals remained pending in the Fifth Circuit and thus did not constitute a strike. As to a fourth prior dismissal, the district court simply noted that the plaintiff's deadline to appeal had not yet expired. *Id.* at *1.

Decisions in the other courts of appeals that have adopted the Fifth Circuit's interpretation of § 1915(g) similarly confirm the rule's clarity and ease of applica-

tion. In *Jennings* v. *Natrona County Detention Center Medical Facility*, 175 F.3d 775 (10th Cir. 1999), the Tenth Circuit summarized a set of clear rules "to provide guidance for future cases," *id.* at 780, including a rule that a dismissal should not count as a strike before the prisoner has exhausted or waived his opportunity to appeal. The court straightforwardly applied that rule, granting *in forma pauperis* status where the plaintiff's appeal from one prior dismissal remained pending and the plaintiff had not yet exhausted or waived his right to appeal a second prior dismissal. *Id.*; *see also Nicholas* v. *Corbett*, 254 F. App'x 117, 118 (3d Cir. 2007) (per curiam) (prior dismissals did not count as strikes because the plaintiff's "appeals were not completed at the time [he] filed" the complaint at issue); *Silva*, 658 F.3d at 1100-1101 (one prior dismissal did not count because appeal was still pending; another prior dismissal did not count because time for seeking certiorari had not yet expired).

B. The Majority Interpretation Calls For The Same Familiar Finality Determination Courts Routinely Make In Other Contexts

In several contexts, courts must determine whether a litigant has exhausted or waived his appellate rights for purposes of assigning some particular significance to a prior judicial decision. The finality determination a court must make under the majority interpretation of § 1915(g) is no different, and there is no reason to expect that making that assessment would be any more problematic in the PLRA's *in forma pauperis* context than in any other.

1. Federal habeas statute of limitations

Under the federal habeas statute, a prisoner in custody pursuant to a state-court judgment must file any habeas petition within a one-year limitations period. 28 U.S.C. § 2244(d)(1). That limitations period runs from the latest of several enumerated dates, one of which is "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). Similarly, a prisoner in custody pursuant to a federal conviction must file any motion for postconviction relief within one year after the latest of several dates, including "the date on which the judgment of conviction becomes final." *Id.* § 2255(f)(1); *see also Clay* v. *United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). To apply those provisions, courts must accordingly determine the date on which a prisoner exhausted or waived his appellate rights with respect to the underlying conviction.

Doing so poses no difficulty. Courts can readily identify the date on which this Court denies certiorari as the date on which a conviction has become final, triggering the one-year limitations period. *See, e.g.*, *Smoak* v. *United States*, 12 F. Supp. 3d 254, 262 (D. Mass. 2014) (conviction became final on date certiorari was denied; limitations period expired one year after that date); *Short* v. *Warden*, 2013 WL 5516440, at *1 (W.D. La. Oct. 2, 2013) (same); *Borst* v. *Glebe*, 2013 WL 2403261, at *4 (W.D. Wash. May 31, 2013) (same). Where no petition for certiorari has been filed, courts can easily determine the date on which a conviction became final by virtue of the prisoner's failure to seek

certiorari within the time allowed. *See, e.g.*, *Anderson* v. *Litscher*, 281 F.3d 672, 675 (7th Cir. 2002) (where state-court prisoner filed no petition for certiorari, one-year limitations period began to run 90 days after the conclusion of state-court review); *James* v. *Beard*, 2014 WL 4961768, at *3 (N.D. Cal. Sept. 29, 2014) (same); *Korn* v. *United States*, 937 F. Supp. 2d 1182, 1186-1187 (C.D. Cal. 2013) (where federal prisoner filed no petition for certiorari, one-year limitations period began to run 90 days after court of appeals affirmed conviction).

2. Retroactive application of new decisions to pending cases

As this Court first held in *United States* v. *Johnson*, 457 U.S. 537 (1982), rules announced in decisions of this Court apply to pending criminal cases differently depending on whether the case involves a conviction that is still pending on direct review or whether the case raises a collateral attack to a conviction that has become final. *See Griffith* v. *Kentucky*, 479 U.S. 314, 321-323 (1987) (discussing *Johnson*). In general, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* at 328. But a rule applies retroactively to judgments that are already final on direct review only in the exceptional circumstances identified in *Teague* v. *Lane* and its progeny. *See Whorton* v. *Bockting*, 549 U.S. 406, 416 (2007) (discussing *Teague*, 489 U.S. 288 (1989)). Outside those circumstances, a prisoner's collateral attack on a final judgment of conviction is governed by the "law prevailing at the time [his] conviction became final." *Teague*, 489 U.S. at 306.

To assess an intervening decision's applicability under this framework, a court must therefore first de-

termine whether the case before it involves a conviction that had already become final on direct review before the intervening decision was issued. *See Beard* v. *Banks*, 542 U.S. 406, 411 (2004) ("First, the court must determine when the defendant's conviction became final."). Doing so, this Court has explained, ordinarily "poses no difficulties." *Id.* "State convictions are final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Id.* at 412 (internal quotation marks omitted). Thus, in applying the *Teague* analysis, courts routinely make the same finality determination called for under the majority interpretation of § 1915(g).

As in the habeas context, courts have no trouble doing so. In *DeCastro* v. *Branker*, 642 F.3d 442, 458 (4th Cir. 2011), for example, a habeas petitioner sought to challenge his conviction under this Court's decision in *Bradshaw* v. *Stumpf*, 545 U.S. 175 (2005), on the ground that the prosecutor's pursuit of inconsistent theories at his criminal trial and the trials of his two confederates violated due process. The Fourth Circuit held *Bradshaw* to be inapplicable, however, because it postdated the finality of the petitioner's conviction, and none of the *Teague* exceptions applied. 642 F.3d at 458. To make the finality determination, the court simply looked to the date on which this Court denied certiorari on direct review from the petitioner's conviction. *Id.* Other courts have similarly looked to the date on which this Court denied certiorari—a "straightforward" step—to determine a conviction's finality for *Teague* purposes. *Jones* v. *Page*, 76 F.3d 831, 851 (7th Cir. 1996); *see also, e.g.*, *Bronshtein* v. *Horn*, 404 F.3d 700, 715 (3d Cir. 2005); *Guzman* v. *United States*, 404 F.3d

139, 140 (2d Cir. 2005); *Earnest* v. *Dorsey*, 87 F.3d 1123, 1132 (10th Cir. 1996).

Alternatively, in cases where a petitioner did not seek review in this Court of the underlying judgment of conviction, courts determine finality for *Teague* purposes by identifying the last date on which the petitioner could have filed a petition for certiorari—another "very straightforward" inquiry. *Winsett* v. *Washington*, 130 F.3d 269, 275 (7th Cir. 1997); *see also, e.g.*, *Jones* v. *Smith*, 231 F.3d 1227, 1237 (9th Cir. 2000); *Glock* v. *Singletary*, 65 F.3d 878, 883-884 (11th Cir. 1995).

3. Res judicata

Finally, the question whether a judgment has become final on appeal is one that courts are familiar with in the context of res judicata. The Sixth Circuit sought to justify its holding below in part on the ground that prior judgments are accorded preclusive effect even while appeal is pending until they are reversed or vacated. Pet. App. 5a. But that is not a uniform rule. And in those jurisdictions that apply res judicata only after a prior judgment has become final on appeal, courts must make the same finality determination called for under § 1915(g), and they have no difficulty doing so.

Under California law, "[u]nlike the federal rule and that of several states," prior judgments are not final for res judicata purposes "until an appeal from the trial court judgment has been exhausted or the time to appeal has expired." *Kay* v. *City of Rancho Palos Verdes*, 504 F.3d 803, 808 (9th Cir. 2007) (internal quotation marks omitted). In *Kay*, the Ninth Circuit easily concluded that the prior judgment at issue was indeed final

because the appellate process in the California courts had been exhausted, as indicated by the issuance of the remittitur. *Id.* at 808-809. Similarly, in *Hill* v. *Clovis Police Department*, 2012 WL 1833880 (E.D. Cal. May 18, 2012), the court, applying California law, held that a prior judgment had no preclusive effect where an appeal remained pending. *Id.* at *3; *see also Harper* v. *City of Monterey*, 2012 WL 195040, at *6 (N.D. Cal. Jan. 23, 2012) (prior judgment was final for res judicata purposes under California law where litigant did not appeal within the allotted time period).

Courts thus have ample experience in a range of contexts identifying the date on which a judgment has become final due to a litigant's exhaustion or waiver of appellate rights. By calling for the same straightforward inquiry, the majority interpretation of § 1915(g) shares the virtues of clarity and ease of administration that characterize the rules that apply in these other familiar contexts.

C. The Sixth Circuit's Interpretation Produces Bizarre Results And Uncertainty, With No Attendant Benefit

In contrast to the clear, familiar, and easily administrable interpretation of § 1915(g) adopted by the majority of lower courts, the Sixth Circuit's reading of the statute creates bizarre results and introduces uncertainty into the application of a statute that Congress designed to reduce and streamline litigation, not increase it. These consequences do not serve the policies animating the PLRA, and common sense alone dictates that they be rejected.

1. The decision below produces anomalous and potentially unjust results

Most obvious among its practical defects, the Sixth Circuit's interpretation permits strikes to arise temporarily and then disappear in the event of reversal or modification on appeal. There is no indication in the PLRA that Congress intended such an anomalous result, under which a court cannot resolve with certainty whether a prisoner shall be barred from proceeding *in forma pauperis*, but can only decide, as petitioner notes, whether the prisoner is barred "for now." Pet. Br. 22. If the prisoner later seeks *in forma pauperis* status again for another suit, the court in the later proceeding must review again whether the three-strikes bar remains, or whether instead one of the strikes relied on by the court in the earlier action has disappeared.

In the interim, the Sixth Circuit's approach to strike-counting can penalize a prisoner for litigation conduct the PLRA is not supposed to penalize. The purpose of the PLRA is to penalize and deter litigation that is truly frivolous, "not to freeze out meritorious claims or ossify district court errors." *Adepegba*, 103 F.3d at 388. Counting prior dismissals as strikes before a prisoner has had the opportunity to correct any error "risk[s] inadvertently punishing nonculpable conduct." *Jennings*, 175 F.3d at 780 (internal quotation marks omitted).

Such errors do occur. Even where a district court dismisses a complaint as wholly frivolous, the appellate process remains meaningful and can result in reversal or modification. In the time it takes to secure relief on appeal, however, the prisoner may be unjustly barred from pursuing a valid claim on account of a previous er-

roneous dismissal. For example, in *Rognirhar* v. *Grannis*, 463 F. App'x 612, 613 (9th Cir. 2011), the district court dismissed as frivolous the plaintiff's challenge under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") to a prison grooming regulation that prohibited inmates from maintaining facial hair extending more than half an inch from the face. Citing circuit precedent sustaining a similar challenge under RLUIPA, the Ninth Circuit held that the RLUIPA claim was not frivolous and accordingly remanded for further proceedings. *Id.* at 614; *see also Holt* v. *Hobbs*, 134 S. Ct. 1490 (2014) (mem.) (granting certiorari to consider similar RLUIPA claim). The reversal, however, took over two and a half years. Under the Sixth Circuit's interpretation of § 1915(g), that erroneous dismissal would have counted improperly as a strike for that entire time.

In *Alfred* v. *Corrections Corp. of America*, 437 F. App'x 281, 285 (5th Cir. 2011), the Fifth Circuit held that the district court abused its discretion in dismissing Alfred's complaint as frivolous. While the district court had thought the complaint "entirely conclusory," the court of appeals held that Alfred "ha[d] pleaded a non-frivolous contention that the defendants committed a constitutional violation," either by "intentionally disclosing" his confidential medical information or by "fostering an atmosphere of disclosure with deliberate indifference to constitutional rights." *Id.* Indeed, on remand, Alfred was able to obtain an amicable settlement. *See* Stipulation of Dismissal, *Alfred* v. *Corrections Corp. of Am.*, No. 09-300 (W.D. La. Dec. 20, 2011) (ECF No. 29). Nearly two years elapsed, however, between the district court's initial dismissal of Alfred's complaint as frivolous and the court of appeals' order reversing the dismissal. *See also, e.g.*, *Fussell* v. *Van-*

noy, __ F. App'x __, 2014 WL 6661143, at *1-2 (5th Cir. Nov. 25, 2014) (reversing district court's dismissal as frivolous of Eighth Amendment claim challenging plaintiff's 25-year confinement to extended lockdown in Angola prison; nearly one year elapsed before dismissal was reversed); *Ford* v. *Hunter*, 534 F. App'x 821, 824 (11th Cir. 2013) (district court "clearly abused its discretion" in dismissing plaintiff's First Amendment claim as frivolous; over a year and a half elapsed before dismissal was reversed).

The meaningfulness of appeal in these and similar cases exposes another problem in the Sixth Circuit's view that any dismissal counts as a strike even before the prisoner has exhausted or waived appeal. Under that interpretation, a prisoner arguably cannot proceed *in forma pauperis* to appeal the very dismissal that would otherwise count as his third strike. *See Adepegba*, 103 F.3d at 388. Even the Sixth Circuit recognized this as an "anomalous result" of its holding. Pet. App. 6a. To avoid the problem, the Sixth Circuit had to address a separate question of statutory interpretation, concluding that "[a] third strike that is on appeal" would not bar the appeal because it "is not a *prior* occasion for the purposes of that appeal." *Id.* The court's only basis for this conclusion was its reasoning that the prior dismissal and the subsequent appeal form "the *same* occasion." *Id.*

By comparison, the Seventh Circuit—which also counts dismissals as strikes before they are final on appeal—similarly recognized the "legitimate" concern raised by that interpretation, but resorted to a different device to solve it. *Robinson* v. *Powell*, 297 F.3d 540, 541 (7th Cir. 2002). According to the Seventh Circuit, the prisoner could simply ask the court of appeals to grant *in forma pauperis* status under Federal Rule

of Appellate Procedure 24(a)(5), and the court could review the correctness of the district court's third dismissal in considering that request. At least one other court has questioned the viability of this approach. *See Henslee* v. *Keller*, 681 F.3d 538, 542 n.8 (4th Cir. 2012) ("The availability of this procedure may be limited by the 2002 amendment to Federal Rule of Appellate Procedure 24, which added language that makes the rule consistent with, and subject to, the requirements of the PLRA." (citing Fed. R. App. P. 24(a)(3)(B) (2002))).

The majority interpretation of § 1915(g) avoids these incongruities. Once a prisoner reaches three strikes, based on three prior qualifying dismissals that are final on direct review, those strikes cannot disappear. The determination need not be revisited for the duration of the prisoner's incarceration. *See, e.g.*, *Adepegba*, 103 F.3d at 388 ("Adepegba is out, and not just in this appeal. Under the terms of the statute, he may pursue another action in federal court i.f.p. only if he is in 'imminent danger of serious physical injury.'"). But there is no risk that an erroneous dismissal will count as a strike against a future *in forma pauperis* claim during the several-month-long—or even years-long—period it takes for a court of appeals to correct the error. And there is no need for the additional interpretive gymnastics the Sixth and Seventh Circuits felt compelled to perform to find a solution to the anomaly that a prisoner might be barred from appealing the third strike.

2. The Sixth Circuit's approach does not promote any PLRA policy

The district court in this case reasoned that the majority interpretation of § 1915(g) "could eviscerate the purpose" of that provision "to deter abusive litigants."

Pet. App. 24a. According to the district court, "a plaintiff could avoid the effect of § 1915(g) by filing three frivolous lawsuits simultaneously and appealing each dismissal," resulting in "a multitude of frivolous lawsuits, with no possibility of applying § 1915(g) to deter the frivolous litigation." *Id.*

These predictions are unfounded and lend no support to the Sixth Circuit's interpretation of the three-strikes provision. The PLRA aims to "filter out the bad claims" while "facilitat[ing] consideration of the good." *Jones* v. *Bock*, 549 U.S. 199, 204 (2007). The majority interpretation readily fulfills that purpose. Under that view, except in cases of imminent danger, a prisoner who repeatedly files frivolous claims will be barred from proceeding *in forma pauperis*—once and for all, for the duration of his incarceration—as soon as three of his actions or appeals have been dismissed on a ground enumerated in the statute and all appeals from those dismissals have been exhausted or waived. Those strikes can never disappear. The three-strikes provision serves its function robustly.

The only difference between that majority interpretation and the Sixth Circuit's unworkable rule arises in the period of time when one or more of a prisoner's prior dismissals remains open to reversal or modification on appeal. Permitting prisoners to proceed *in forma pauperis* during that time frame poses no threat to the purposes of the PLRA. As an initial matter, as respondents have conceded, this particular circumstance "does not arise frequently" and does so "only [in] a narrow and highly specific category of cases." Opp. 6. While the stakes are significant for the individual prisoners involved—who can be barred for months or even years from pursuing potentially valid constitutional claims due to an erroneously entered third strike—the

consequences for the judicial system as a whole of allowing such claims to go forward are marginal at best.

Moreover, the PLRA contains numerous other mechanisms "to prevent sportive filings in federal court." *Skinner* v. *Switzer*, 131 S. Ct. 1289, 1299 (2011). In 1998, this Court recognized the evident success of those mechanisms in reducing frivolous claims. *See Crawford-El* v. *Britton*, 523 U.S. 574, 597 (1998) ("Recent statistics suggest that the Act is already having its intended effect."). More recent statistics confirm that the PLRA's other screening mechanisms and requirements have continued to be effective. *See* Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, U.C. Irvine L. Rev. (forthcoming 2015) (available as Public Law & Theory Research Paper Series Paper No. 427 and Law & Economics Research Paper Series Paper No. 14-020, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506378). Data compiled by the Administrative Office of the U.S. Courts confirm that "[a]fter a very steep decline in both filings and filing rates in 1996 and 1997, rates continued to shrink for another decade," eventually reaching a plateau far lower than pre-PLRA rates. *Id.* at 5-6.

The magnitude of that reduction varies by State. Notably, Mississippi (located in the Fifth Circuit, which follows the majority interpretation) is among the States that has experienced the largest percentage decline in prisoner filing rates, while Illinois (located within the Seventh Circuit, which does not apply the majority interpretation) is among the States with the smallest percentage decline. *Id.* at 9; *see also id.* at 7 table 2 (showing change in filing rates by State). These data obviously reflect numerous considerations and do not permit any inferences about causation. But they none-

theless belie the district court's prediction (Pet. App. 24a) that adopting the majority interpretation of § 1915(g) would cause a proliferation of frivolous lawsuits.

The decision below thus injects unworkability and incongruity into the administration of the PLRA with no apparent benefit in return. The Sixth Circuit's decision is not necessary to promote any purpose of the PLRA, but only undermines the statute's goals by complicating the administration of the three-strikes provision and threatening to penalize nonculpable litigation conduct.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted.

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ANDRÉ LEE COLEMAN,
A/K/A ANDRÉ LEE COLEMAN-BEY, PETITIONER

v.

TODD TOLLEFSON, ET AL.

ANDRÉ LEE COLEMAN, PETITIONER

v.

BERTINA BOWERMAN, ET AL.

ANDRÉ LEE COLEMAN, PETITIONER

v.

STEVEN DYKEHOUSE, ET AL.

ANDRÉ LEE COLEMAN, PETITIONER

v.

AARON J. VROMAN, ET AL.

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Kitty Calavita, Professor Emerita of Criminology, Law and Society at the University of California, Irvine.

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[1] Counsel of record for both parties received notice of the intent to file this brief. *See* S.Ct. Rule 37. Counsel for both parties have consented, and their written consents have been filed with the Court. No counsel for a party authored this brief in whole or in part, and neither a party nor counsel for a party made any monetary contribution intended to fund the brief's preparation or submission.

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SUMMARY OF ARGUMENT

The Prison Litigation Reform Act's "three strikes" provision, 28 U.S.C. § 1915(g), bars a prisoner from bringing a civil action without prepaying the full amount of the filing fee only if that prisoner has three prior qualifying dismissals that have become final on appeal.

Reversing the Sixth Circuit's contrary reading of the statute in this case will not open the floodgates to frivolous prisoner litigation, as both the provisions of the Prison Litigation Reform Act (PLRA) and data from the Federal Judicial Center confirm.

First, meritorious litigation by prisoners is not as rare as conventional wisdom would have it. Prisoners obtain relief by judgment or settlement in over 10 percent of cases.

Second, the PLRA has cut the litigation rate per prisoner by more than half since 1995. The federal courts' docket management needs do not compel further restrictions on merits adjudication of prisoner lawsuits.

Third, other provisions of the PLRA—such as merits screening, the administrative exhaustion requirement, limitations on fee-shifting, and the prohibition on waiving the case filing fee even for indigent prisoners—keep the floodgates firmly shut.

Fourth, the longstanding division of authority on the issue presented allows for observation about the effects of each rule on litigation rates. The

evidence from the Circuits on each side of this split suggests that the majority three-strike rule will not increase prisoner litigation. The majority circuits, where a dismissal was a PLRA "strike" only upon appellate finality, generally did not experience higher rates of prisoner litigation after adopting that rule than before. Nor did the Seventh Circuit experience a drop-off in prisoner lawsuits after adopting the contrary rule.

There is no reason to believe adopting the majority rule will materially increase the lower federal courts' overall prisoner docket. But the Sixth and Seventh Circuit's minority view has a high cost: shutting the courthouse door to meritorious claims. Petitioner's interpretation of the "three strikes" rule, adopted by the majority of the Courts of Appeals, adheres more faithfully to the balance Congress struck in the PLRA than Michigan's alternative does.

ARGUMENT

1. Meritorious Prisoner Litigation is Not a Rarity.

Complaints about prisoner litigation are common, often bewailing both the volume and high percentage of meritless claims. "Needle-in-a-haystack" metaphors abound. But the metaphor is inapt. *See, e.g.*, Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 Brooklyn L. Rev. 519 (1996) (questioning whether several well-publicized cases of ostensibly frivolous prisoner litigation were in fact frivolous). In fact, prisoners are no more litigious

than everyone else, and more than a tenth of their cases succeed in some way, even after the PLRA.

Even before the Prison Litigation Reform Act, prisoners filed fewer lawsuits per capita than the population at large. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1575–78 (2003). In 1993, filings from state and federal courts reflect that members of the public filed 56 state and federal lawsuits per 1,000 citizens—the vast majority in state court. Prisoners, by comparison, filed an estimated 33 state and federal civil lawsuits per 1,000 inmates—the majority in federal court. Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. at 1573–77 (25 civil federal cases per thousand inmates, and an estimated 8 more in state court). Today, in 2012 and 2013, prisoners filed around 25,000 new federal civil cases per year, at a far lower per capita rate of approximately 10 lawsuits per 1,000 prisoners.[2] (Current state filing figures are not available.)

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[2] In 2012, prisoners filed 25,515 civil rights and prison conditions lawsuits in federal district courts, representing 8.9% of the 285,260 new civil cases. In 2013, prisoners filed 25,334 suits, representing 9.3% of the 271,950 new civil cases. *Judicial Business of the United States Courts: 2013 Annual Report of the Director of the Administrative Office of the United States Courts*, Table C-2, Cases Commenced, By Basis of Jurisdiction and Nature of Suit, available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C02Mar13.pdf (last viewed December 4, 2014). These figures all exclude habeas cases.

Further, before the PLRA, prisoners obtained a judgment or settlement in about 15 percent of cases. Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. at 1587–90; *id.* at 1692.[3] Similarly, in fiscal year 2012, prisoner civil rights cases in federal court were resolved in the plaintiff's favor by judgment or settlement 11.1 percent of the time. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, Univ. of Mich. Public Law and Legal Theory Research Paper Series No. 427; Univ. of Mich. Law & Economics Research Paper Series No. 14–020, forthcoming 5 U.C. Irvine L. Rev., at 13–14 (2015), at http://ssrn.com/abstract=2506378; *see also* Alexander Reinert, Measuring the Success of *Bivens* Litigation and Its Consequences for the Individual Liability Model, 62 Stan. L. Rev. 809, 836 n. 138 (2010) (15 percent success rate for prisoner *Bivens* cases).

This Court should not entertain the inaccurate perception that meritorious prisoner litigation is truly a "needle in a haystack." Even after surmounting all of the PLRA's obstacles to prisoner litigation, 11 percent of prisoner cases end with the plaintiff obtaining some type of relief. In recent years, this Court's own docket has featured prisoners with legitimate claims who sued or appealed *pro se*. *See, e.g., Holt v. Hobbs*, No. 13–6827; *Millbrook v. United States*, 133 S. Ct. 1441 (2013); *Erickson v. Pardus*, 551 U.S. 89 (2007).

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[3] The success rate is calculated by summing voluntary dismissals, recorded settlements, and litigated resolutions in plaintiffs' favor. *Id.*

Fittingly, even as it sought to reduce frivolous prisoner litigation by passing the PLRA in 1996, Congress never intended to bar legitimate claims. *See, e.g.*, 141 Cong. Rec. S14418 (Sept. 27, 1995) (statement of Sen. Hatch, introducing S. 1279, a similar earlier version of the PLRA, as an antidote to frivolous prisoner litigation); 141 Cong. Rec. S14627 (Sept. 29, 1995) (Statements of Sen. Hatch) ("Indeed, I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."); *id.* at S14628 (Statement of Sen. Reid) ("If they have a meritorious lawsuit, of course they should be able to file. I support that."); *id.* (Statement of Sen. Thurmond) ("[T]his amendment will allow meritorious claims to be filed, but gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates.").

These legislators believed that a flood of frivolous prisoner claims risked diluting the courts' ability to give fair consideration to potentially meritorious cases. Senator Kyl specifically held out a 50 percent reduction in frivolous filings as a worthwhile goal that would free up judicial resources for adjudication of more substantial claims. 141 Cong. Rec. S14628–29 (Sept. 29, 1995). Thus, the PLRA's proponents sought to restore a balance between docket control and access to the courts. But because they believed that balance had been upset by abuse of the prior regime's permissiveness, the PLRA focused on giving courts more docket control tools.

2. Prisoner Litigation Has Declined Dramatically Since the PLRA's Enactment

Historical data from the Federal Judicial Center reveals that the PLRA has achieved its proponents' aims of reducing prisoner litigation in federal court. After the statute's passage, prisoner litigation decreased dramatically. Litigation rates first declined sharply in the years immediately after the PLRA's passage and then generally stabilized afterwards. Even the absolute volume of litigation in federal court about prison conditions and prisoner civil rights has markedly declined nationwide since the PLRA's passage in 1996, despite the growth in prison population:

PRISONERS AND PRISONER CIVIL RIGHTS FILINGS IN FEDERAL DISTRICT COURT, FISCAL YEARS 1985–2012

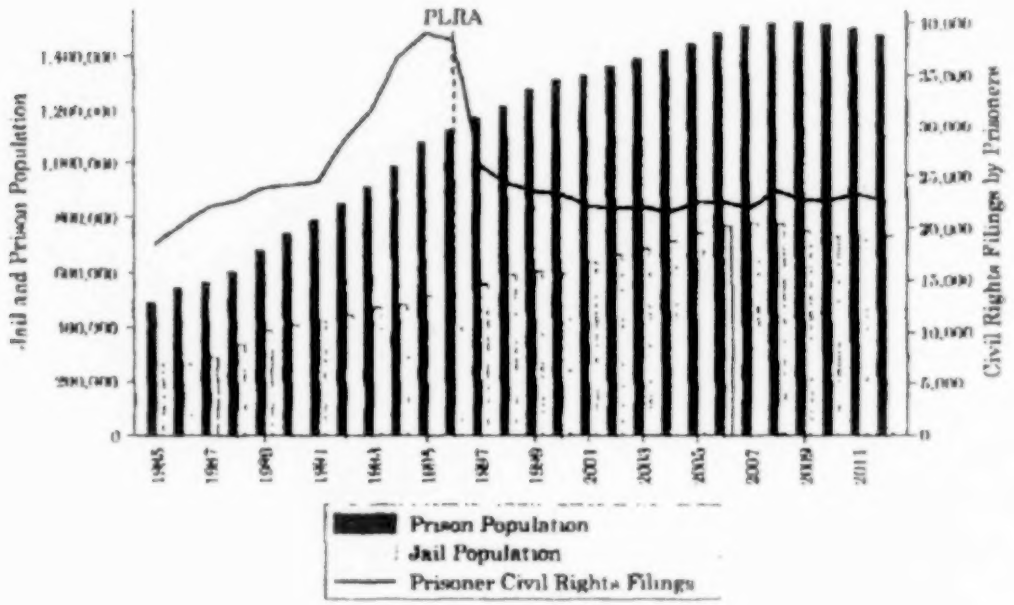
Fiscal Year of Filing	Incarcerated Population (Jail & Prison)	Cases filed	Filings / 1000 Prisoners
1985	752,603	18,485	24.6
1986	806,063	20,360	25.3
1987	853,114	22,067	25.9
1988	942,827	22,642	24.0
1989	1,070,227	23,737	22.2
1990	1,151,457	24,051	20.9
1991	1,215,144	24,352	20.0
1992	1,292,465	28,544	22.1
1993	1,375,536	31,693	23.0
1994	1,469,904	36,595	24.9
1995	1,588,370	39,053	24.6
1996	1,643,196	38,262	23.3
1997	1,733,150	26,095	15.1
1998	1,816,528	24,212	13.3
1999	1,889,538	23,512	12.4
2000	1,915,701	23,357	12.2
2001	1,969,747	22,131	11.2
2002	2,035,529	21,988	10.8
2003	2,082,145	22,061	10.6
2004	2,137,476	21,553	10.1
2005	2,189,696	22,484	10.3
2006	2,260,714	22,469	9.9
2007	2,295,982	21,978	9.6
2008	2,302,657	23,555	10.2
2009	2,274,099	22,698	10.0
2010	2,255,188	22,736	10.1
2011	2,227,723	23,362	10.5
2012	2,221,283	22,662	10.2

Margo Schlanger, *Trends in Prisoner Litigation*, at 5.[4]

[4] Case filing figures are derived from the Federal Judicial Center's annual data tabulating lawsuits terminated in federal

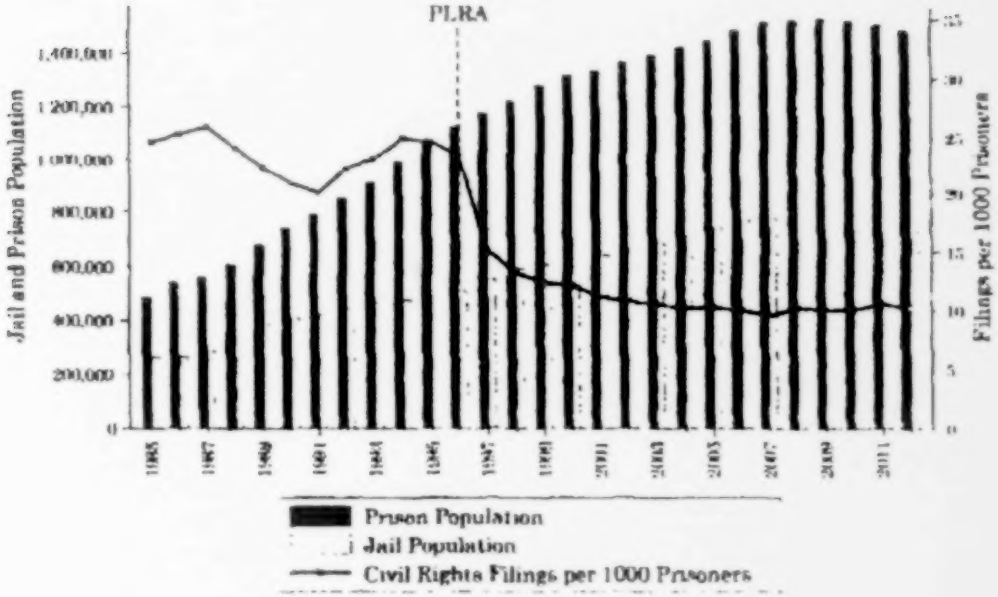
Or to illustrate the same trend graphically,

PRISONER POPULATION AND CIVIL RIGHTS FILINGS



district court, coded by nature of suit. Jail and prison populations are derived from publications of the Department of Justice's Bureau of Justice Statistics. *See Trends in Prisoner Litigation*, Technical Appendices.

The decline in prisoner litigation is even more precipitous on a per-capita basis:



Prisoner litigation has decreased nearly 60 percent per capita from the immediate pre-PLRA rate in 1995. Accordingly, the perceived need for docket control that prompted the PLRA's passage in 1996 is far less urgent now than it was two decades ago. Moreover, the three strikes rule is not the sole or even primary reason for the decrease in prisoner lawsuits.

3. Other Provisions of the PLRA Besides the Three Strikes Rule Restrain Prisoner Litigation.

Requiring appellate finality before a dismissed lawsuit or appeal counts as a PLRA "strike" will not

open the floodgates to meritless claims. Other provisions of the PLRA ensure that federal courts have a well-stocked toolkit to control the prisoner docket and speedily dispose of prisoner cases. Indeed, even without the three strikes rule, the PLRA imposes daunting obstacles for a prisoner seeking relief in federal court.

A. Merits Screening by the Courts

One significant docket control tool the PLRA gives district courts—one that differentiates between meritorious and frivolous claims—is merits pre-screening. Once the prisoner submits his complaint to the district court, the court pre-screens it, often with the aid of specialized *pro se* law clerks, and dismisses it prior to serving the defendant if the complaint is frivolous or malicious, fails to state a claim, or seeks money damages from an immune defendant.[5] 28 U.S.C. § 1915A. Although the Federal Judicial Center dataset does not allow a tally of the number of complaints dismissed through pre-screening, it does include data about the time from filing to disposition of cases.

A large percentage of prisoner claims are resolved rapidly—more rapidly than other civil rights claims. From 2009 to 2011, fully 25 percent of

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[5] This review occurs at the outset of litigation. Thus screening will generally occur before defendants receive notice of the action and therefore before there is any motion to revoke IFP status under § 1915(g) in the event it is erroneously granted to a litigant with three strikes.

prisoner civil rights cases were disposed of in 40 days or fewer, and half were disposed of in 135 days or fewer. In contrast, cases coded as non-prisoner civil rights claims—which include, for example, civil rights lawsuits against police—took more than twice as long to resolve—100 days to dispose of the first 25 percent, and 270 days to dispose of the first half. Margo Schlanger, *Trends in Prisoner Litigation*, at 14.

That district courts close fully half of prisoner civil rights lawsuits in five months or less, and far more rapidly than other similar cases, suggests that courts have the tools they need to weed out frivolous complaints—and that there is no docket-control imperative to erect further barriers to adjudicating prisoner cases on the merits.

B. Administrative Remedies

Before filing suit, prisoners must exhaust any administrative remedies. 42 U.S.C. § 1997e(a). This is a major hurdle. In some cases, of course, prison administrators use the grievance process to efficiently correct their own errors before litigation arises. *Woodford v. Ngo*, 548 U.S. 81, 94 (2006). At the same time, every incentive for the prisons is to create onerous grievance rules, making it "less likely a prison or jail, or staff members, will have to pay damages or be subjected to an injunction in a subsequent lawsuit." Margo Schlanger and Giovanna Shay, *Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. Pa. J. Const. L. 139, 149 (2008).

States design administrative grievance procedures, interpret them in the first instance, and reap subsequent litigation benefits from making those grievance procedures steep. Schlanger and Shay, *Preserving the Rule of Law in America's Prisons,* 11 U. Pa. J. Const. L. at 146–50. Some states impose grievance deadlines as short as two days after the alleged violation, and deadlines under two weeks are common. *Woodford*, 548 U.S. at 118 (Stevens, J., dissenting). Perversely, such short deadlines impose the most onerous burdens on prisoners with the strongest claims for damages: those who were severely injured at the hands of a guard or another inmate, who could very well find a claim procedurally defaulted while incapacitated. *See, e.g., Steele v. N.Y. State Dept. of Corr. Servs.*, 2000 WL 777931 (S.D.N.Y. June 19, 2000) (prisoner's claim defaulted while he was hospitalized outside prison during the entire grievance period).

The law also encourages states to require strict compliance with grievance procedures. If the state entertains a grievance on the merits despite technical noncompliance, courts may find a waiver of the failure-to-exhaust defense. *See, e.g., Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004); *Hill v. Curcione,* 657 F.3d 116, 125 (2d Cir. 2011) (citing *Riccardo* and other cases). The exhaustion requirement encourages prisons to devise ever-higher procedural hurdles, and to enforce them strictly, to protect themselves against subsequent litigation.

Even when fairly applied, the administrative exhaustion requirement imposes a formidable

barrier to many prisoners bringing a lawsuit at all. And state officials have the motive and opportunity to create stringent rules and apply them strictly.

C. Limitations on Attorney's Fees

If the prisoner obtains no administrative relief, he is unlikely to find an attorney to help with his case. The PLRA limits fee-shifting under 42 U.S.C. § 1988 in several ways, including by capping the hourly rate for attorneys seeking fees and separately capping the total fee award at 150 percent of any money judgment. 42 U.S.C. § 1997e(d)–(e). These limits discourage qualified attorneys from taking prisoner cases, especially meritorious but low-damage cases.

Further, even the roughly 11 percent of prisoners who ultimately succeed on their claims typically receive small judgments, further deterring attorney involvement. Schlanger, *Trends in Prisoner Litigation* p. 13–16. In district court cases in 2012, when a prisoner-plaintiff won damages at trial, the mean award was under $22,000 and the median award was just $1,525. *Id.* For cases where the prisoner prevailed without a trial, the mean award was under $19,000 and the median award was $7,000. *Id.* With limited fee-shifting and low damages awards, few prisoner cases attract attorneys.

The nature of prisoner litigation also discourages contingent-fee work in general. The contingent-fee business model relies on many cases settling quickly. Schlanger, *Inmate Litigation*, 116

Harv. L. Rev. at 1656. Yet settlement rates in prisoner litigation are unusually low because corrections officials typically do not want to capitulate to prisoners, both on principle and because it will encourage more litigation. Schlanger, *Inmate Litigation*, 116 Harv. L Rev. at 1613–22. And when prisoner cases do settle, they typically settle deeper into litigation than other types of cases. Schlanger, *Trends in Prisoner Litigation* at 10–11. In sum, the economics seldom add up for lawyers to take these cases, except for the occasional pro bono representation. So most prisoner-plaintiffs—95 percent—are compelled to file suit *pro se*, *id.* at 14, while others do not file suit at all.

D. Cost of Filing Suit (Even Before Three Strikes)

Under the PLRA, all prisoners must pay the full filing fee for a civil case regardless of indigency so long as they have any assets. Prisoners with fewer than three strikes are permitted to make down payments on the fee based on their commissary account balance and monthly income. Later, prison officials debit the prisoner's account monthly until the filing fee is paid in full, based on a statutory formula. 28 U.S.C. § 1915(b)(1)–(4).

The filing fee is no small deterrent. The current filing fee for a civil case in federal court is $400; for an appeal, $505.[6] Those sums represent

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[6] 28 U.S.C. §§ 1913-14; http://www.uscourts.gov/FormsAndFees/Fees/DistrictCourtMiscellaneousFeeSchedule.aspx and

months, if not years, of prison wages. Prison wages are typically far below federal minimum wage. For instance, Federal Prison Industries Inc. pays between 23 cents and $1.15 per hour; the California Prison Industry Authority pays inmates 30 to 95 cents per hour, before deductions; Tennessee state prisoners top out at 59 cents per hour; in New York City, inmates earn up to $1.00 per hour.[7] A filing fee that takes months or years to pay off is a tremendous barrier to indigent prisoners' practical access to the courts.

In sum, the three strikes rule is not the linchpin of the PLRA's scheme to restrain prisoner litigation. That rule is instead among a long line of obstacles, both legal and practical, that a prisoner must surmount before having a lawsuit heard on the merits. There is no imperative to read the PLRA's three-strikes provision as broadly as humanly possible.

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http://www.uscourts.gov/FormsAndFees/Fees/CourtOfAppealsMiscellaneousFeeSchedule.aspx (setting forth the schedule of fees authorized by § 1913).

[7] *See* http://www.bop.gov/inmates/custody_and_care/unicor.jsp (last visited December 4, 2014); http://www.calpia.ca.gov/About_PIA/FastFacts.html (last visited December 4, 2014); Administrative Policies and Procedures, State of Tennessee Dept. of Correction, Index #504.04 (Oct. 13, 2013); City of New York Department of Correction Directive 4014R-A (April 11, 2007) (available at http://www.nyc.gov/html/doc/downloads/pdf/4014R-A_c.pdf) (last visited December 4, 2014).

4. Prisoner Litigation Did Not Increase after Circuits Adopted Petitioner's View of the Three-Strikes Rule.

Historical data from the Federal Judicial Center permits a comparison of prisoner litigation rates before and after various Courts of Appeals ruled on the issue presented. In circuits that adopted a rule requiring appellate finality before counting a dismissal as a PLRA strike, district courts did not experience higher or faster-increasing rates of prisoner litigation after adopting that rule than beforehand.[8]

The prisoner litigation rate did not increase in the Fifth Circuit after it became the first circuit to adopt the majority rule in *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir. 1996); instead, the rate plummeted, due to the overall effects of the PLRA as described above. Specifically, prisoner litigation in the Fifth Circuit declined from 27 lawsuits per 1,000 prisoners in 1996, to 20 such suits in 1997, to 15 suits in 1998, and to under 10 by 2005. The Fifth Circuit litigation rate has remained steady at 8 to 9 lawsuits per 1,000 prisoners ever since.

Nor did prisoner litigation increase in the Tenth Circuit in 1999, the First Circuit in 2000, or the Eighth Circuit in 2006 when those courts announced they were following *Adepegba*. By the time the Tenth Circuit adopted the majority view in

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[8] Charts of prisoner litigation rates by circuit are attached as Appendix A.

Jennings v. Natrona Cnty. Detention Ctr. Med. Facility, 175 F.3d 775 (10th Cir. 1999), prisoner litigation rates in the Tenth Circuit had already declined from about 25 lawsuits per 1,000 prisoners in 1995 to about 11 such suits in 1999. After 1999, they declined still further, and have remained at under 10 lawsuits per 1,000 prisoners since 2002.

Similarly, by the time the First Circuit adopted the majority rule in *Michaud v. City of Rochester*, 2000 WL 1886289 (1st Cir Dec. 27, 2000) (unpublished opinion), prisoner litigation in the First Circuit had declined from about 12 lawsuits per 1,000 prisoners in 1995 to just over 6 lawsuits in 2000. And since that time, litigation rates in the First Circuit have remained stable at between 5 and 7 lawsuits per 1,000 prisoners.

The Eighth Circuit's experience was similar: when that court adopted the majority rule in 2006, *Campbell v. Davenport Police Dept.*, 471 F.3d 952 (8th Cir. 2006), prisoner litigation had already declined from over 57 lawsuits per 1,000 prisoners in 1995 to about 12 such suits in 2006. And prisoner litigation in the Eighth Circuit remained stable at 12 to 14 lawsuits per 1,000 prisoners from 2006 to 2011.[9]

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[9] There is one outlier: prisoner litigation rates did increase slightly the year after the D.C. Circuit adopted the majority rule in *Thompson v. DEA*, 492 F.3d 428 (D.C. Cir. 2007), from 77 to 85 lawsuits per 1,000 prisoners, then declined to 35 lawsuits per 1000 prisoners by 2011. But the D.C. District's litigation rate is more variable from year to year than the regional circuits, unsurprisingly given its small prisoner

Meanwhile, the Seventh Circuit, which adopted the anti-prisoner minority rule earliest in *Robinson v. Powell*, 297 F.3d 540, 541 (7th Cir. 2002), did not experience a significant change in its litigation rate when it adopted that rule in 2002. Rather, the Seventh Circuit consistently saw about 9 to 10 lawsuits filed per 1,000 prisoners from 2000 to 2008, before seeing a modest increase to 12 to 13 lawsuits in 2009 to 2011.

These figures do not purport to show, and we make no claims about, causation. Other factors are also in play here. The point is, the circuits in the majority adopted Petitioner's interpretation of § 1915(g) over a decade-plus period, and yet with the exception of the outlier D.C., all saw their prisoner litigation rates either decline or remain essentially flat in the years after doing so.

In other words, there is no reason to believe a ruling either way will materially alter the volume of prisoner litigation. Reversing the Sixth Circuit will not open the floodgates. Indeed, Michigan argued at the certiorari stage that the issue presented here arises infrequently. Br. in Opp. to Pet. at 5–8. The State has already conceded there is no floodgates problem. Defending a handful of additional prisoner cases on the merits will not drain Michigan's resources, nor will adjudicating them overburden the courts.

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population and high proportion of plaintiffs from other states suing federal officials.

To summarize, the PLRA has achieved its docket-control aims. Having already reduced the prisoner litigation rate so dramatically, there is no need to interpret the PLRA to impose still more barriers to merits adjudication of prisoner lawsuits. Moreover, there is no reason to think adopting the majority view will significantly increase the rate of prisoner litigation. Petitioner's rule allows more lawsuits to be resolved on their merits, and that is a worthy end in itself. His interpretation of § 1915(g) is faithful to the balance Congress struck in the PLRA.

CONCLUSION

Amici respectfully ask this Court to reverse the judgment of the Sixth Circuit and remand the cases for further proceedings.

Respectfully submitted,

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DECEMBER 2014

APPENDIX

APPENDIX

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Figures of Civil Rights District Court Filing Rates from 1990-2012 ..... 1a

APPENDIX

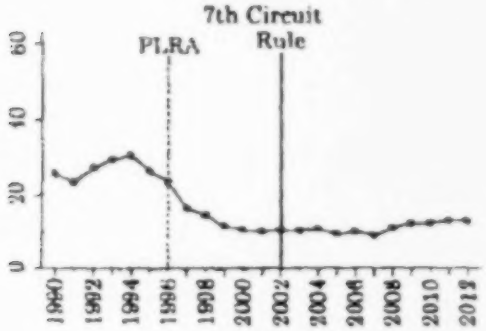
The figures below set out, by circuit, the prisoner civil rights district court filing rates from 1990 to 2012 (the most recent year for which full data is available). The figures are presented in three panels, to aid comparison: Panel 1 is just the 7th Circuit, the only circuit that adopted the minority rule before 2011 (and therefore long enough ago to examine post-adoption filing rates). Panel 2 includes the 1st, 2d, 5th, 8th, and 10th Circuits—all of which adopted the majority rule prior to 2011. (Because of its unusual variance, the D.C. Circuit's data is in a table following the figures.) Panel 3 includes the remaining circuits, which adopted their PLRA interpretations in 2011 or later, too late to evaluate post-adoption data.

SUMMARY BY CIRCUIT OF RULE STATUS AND RULE ADOPTION YEAR

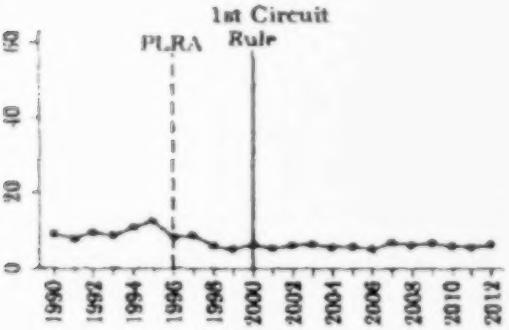
Panel	Circuit	Year Three-Strikes Rule Announced	Rule Adopted
1	7th	2002	minority
2	DC	2007	majority
	1st	2000	majority
	2d	2010	majority*
	5th	1996	majority
	8th	2006	majority
	10th	1999	majority
3	3d	2013	majority
	4th	2012	majority*
	6th	2013	minority
	9th	2011	majority
	11th	2012	majority*

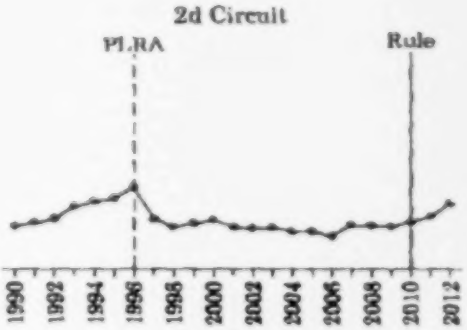
* Rule is implied rather than squarely stated.

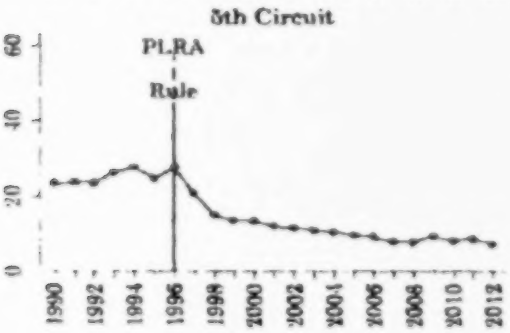
PANEL 1: MINORITY RULE ANNOUNCED BEFORE 2011

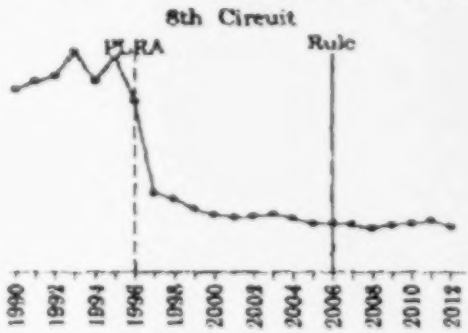


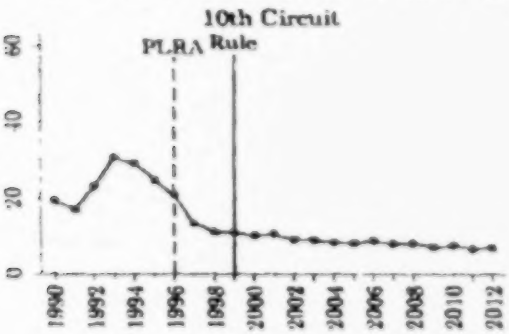
PANEL 2: MAJORITY RULE ANNOUNCED BEFORE 2011



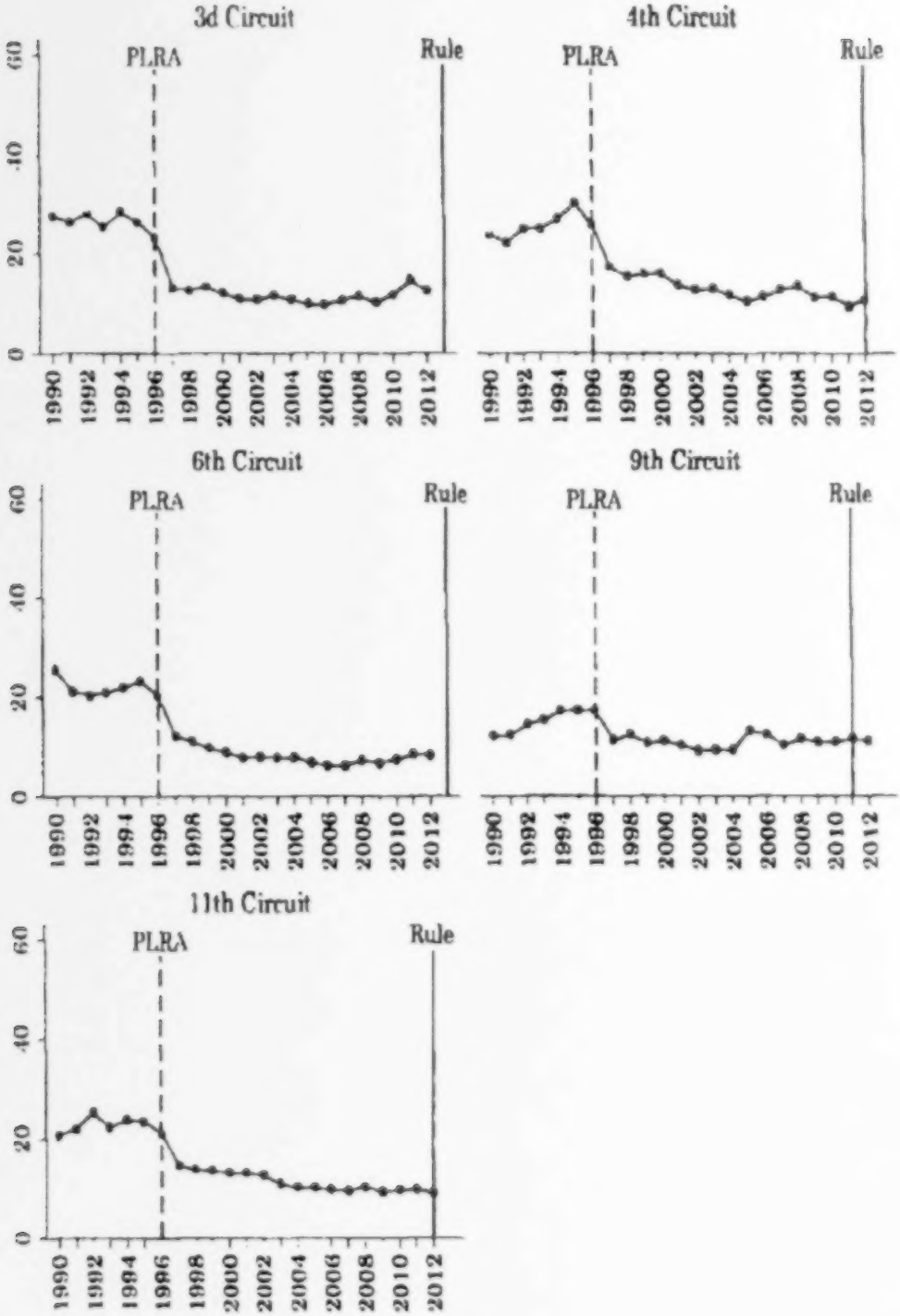








PANEL 3: RULE ANNOUNCED 2011-2013



PRISONER CIVIL RIGHTS DISTRICT COURT FILING RATES, FY 1990-2011, D.C. CIRCUIT

Filing Year	Filing Rate/ 1000 Prisoners
1990	15.2
1991	8.3
1992	12.9
1993	10.3
1994	30.9
1995	36.8
1996 (PLRA)	33.5
1997	37.6
1998	31.8
1999	36.7
2000	55.0
2001	203.3
2002	72.4
2003	126.1
2004	73.6
2005	134.6
2006	66.5
2007 (Rule Announced)	78.0
2008	85.0
2009	81.6
2010	56.0
2011	39.9
2012	62.3